Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-30

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Petitioners,

vs.

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Respondents,

and

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1978

No. .....

JOSEPH MANCH, *et al.*,

Petitioners,

v.

GEORGE ARTHUR, *et al.*,
EWALD P. NYQUIST, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners are the individual members of the Board of Education of the City of Buffalo, the Superintendent of Schools, and the individual members of the Common Council of the City of Buffalo. They pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 8, 1978.

Opinions Below

The March 8, 1978 opinion of the United States Court of Appeals for the Second Circuit is reported at 573 F. 2d 134

and is reproduced in the Appendix at pages 163a-190a. The order denying petitioners' Petition for Rehearing *en Banc* was entered on May 26, 1978, without opinion, and is reproduced in the Appendix at pages 193a-194a. The April 30, 1976 opinion of the United States District Court for the Western District of New York is reported at 415 F. Supp. 904, and is reproduced in the Appendix at pages 12a-129a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 8, 1978. A timely petition for rehearing, or in the alternative, rehearing *en banc*, was filed by the individual members of the Buffalo Common Council and was denied May 26, 1978. This petition for certiorari will be filed within 90 days of the date of denial. The members of the Board of Education and the Superintendent of Schools for the City of Buffalo applied for and received on May 26, 1978 an extension of time in which to file a petition to and including July 5, 1978. This Court's jurisdiction is invoked pursuant to the provisions of 28 USC Section 1254(1) and Rule 22(3) of the Supreme Court Rules.

Questions Presented

1. Did the Circuit Court err in applying an objective, "foreseeable consequences" standard in determining segregative intent?

2. Did the lower courts err in using evidence of independent non-party governmental actions as furthering discrimination in residential housing patterns within the City?

3. Even assuming the validity of the foreseeable consequences test, did the Circuit Court err in applying that standard inconsistently with respect to the City and State defendants?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion

which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Section 2000c-6

Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants.

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer of signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are to become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in *loco parentis*. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18.

New York Education Law

Article 52, Section 2551

Board of education corporate body

The board of education of each city school district of a city with one hundred twenty-five thousand inhabitants or more according to the latest federal census is hereby continued as a body corporate.

New York Education Law

Article 65, Section 3201

Discrimination on account of race, creed, color or national origin prohibited

1. No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin.

2. Except with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins; and no school district, school zone or attendance unit, by whatever name known, shall be established, reorganized or maintained for any such purpose, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian, and further provided that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its pupils exclusively or primarily from members of such religion or denomination or from giving preference to such selection to such members or to make such selection to its pupils as is calculated to promote the religious principle for which it is established.

New York Public Housing Law

Article 1, Section 3(2)

The term "authority" means a public corporation which is a corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution and includes the following municipal housing authorities established prior to the first day of January, nineteen hundred thirty-nine pursuant to chapter four of the laws of nineteen hundred thirty-four and amendments thereof, namely, Buffalo municipal housing authority, Lackawanna municipal housing authority, New York city housing authority, Peekskill housing authority, Port Jervis

housing authority, Schenectady municipal housing authority, Syracuse municipal housing authority, Tarrytown municipal housing authority, Tuckahoe housing authority, municipal housing authority of the city of Utica, New York, and Yonkers housing authority.

Statement of the Case

This petition presents for decision an unsettled legal issue of significance to every school district in the country. This Court is presented with the opportunity to end confusion among the Circuits and definitively rule whether the foreseeable consequences test is a proper method of determining segregative intent.

A. Procedural History

This school desegregation case was filed by the plaintiffs as a class action on June 26, 1972 against Ewald P. Nyquist, Commissioner of Education, The Board of Regents of the State of New York, Joseph Manch, Superintendent of Schools and the Board of Education of the City of Buffalo. With respect to the City of Buffalo School defendants, the complaint alleged that (1) defendants had denied plaintiffs and other members of their class equal educational opportunity; (2) defendants had permitted and intensified the sharp separation of the Buffalo school population into racially identifiable schools; and (3) defendants had created, maintained, permitted, condoned and perpetuated a dual and racially segregated system of public schools.

On April 30, 1974, an order was filed adding as party-defendants the Common Council of the City of Buffalo and its members and the Mayor of the City, Stanley Makowski. The answer for all City defendants was filed July 16, 1974. On October 1, 1974, a joint stipulation of facts was filed and a

full trial on the merits commenced. Testimony in the trial finished on October 23, 1974. Plaintiffs' post-trial brief was filed January 13, 1975 and defendants' briefs on March 17 and 19, 1975. All parties filed proposed findings of fact and conclusions of law in July of 1975 and closing arguments of counsel were made on October 19, 1975.

By an order of April 30, 1976, the District Court granted over defendants' objection plaintiffs' motion to amend the summons and amend the title and Article IV of the complaint by adding the members of the Board of Regents as individuals, the new Superintendent of Schools, and the present individual members of the Board of Education.

On April 30, 1976, the District Court issued its decision and order regarding the question of liability in this case. The defendants were ordered to submit plans to desegregate the Buffalo Public School System. Plans were filed by the City defendants on May 19, 1976 and on May 27, 1976, the plaintiffs made a motion to enjoin the defendants from implementing this plan and to request the Court to appoint a monitor. Hearings on the plaintiff's motion to restrain implementation of the Buffalo Plan began on June 21 and continued through July 1, 1976. The Court filed its decision on the hearing on July 9, 1976. At that time, a plan for the 1976-77 school year was approved.

On June 22, 1976, the Court granted permission to intervene to the Community Advisory Board for Bilingual Education of Buffalo and to City Councilman William A. Price on June 24, 1976. The Court also granted the motion of the Buffalo Teachers Federation, a union for teachers in the Buffalo Public School System, to intervene as *amicus curiae*.

The City and State defendants filed Notices of Appeal on September 20. The State defendants appealed the Court's finding of liability in its April 30, 1976 decision. The City defen-

dants appealed both the finding of liability and the remedy order of July 9, 1976.

The plaintiffs moved to dismiss the City defendant's appeal as untimely. The City defendants maintained that the Court's April 30th decision and order was not a final order and that the time for appealing began to run after the July 9th decision. This motion was argued before the Circuit Court of Appeals in December, 1976. This Court ruled that the appeal was timely.

The District Court filed an order on December 14, 1976 directing all parties to analyze and brief the Supreme Court decision *Austin Independent School District v. U.S.*, 429 U.S.990 (1976) and *Washington v. Davis*, 426 U.S. 229 (1976) as they pertain to this case. On December 30, 1976, the City defendants filed a Notice of Motion to vacate, or in the alternative, to reconsider the District Court's decision and order of April 30, 1976 in light of the recent Supreme Court decisions. The District Court on March 1, 1977 filed its decision and order reaffirming the Court's decision of April 30, 1976. A Notice of Appeal from that order was filed by the City defendants on March 8, 1977.

Argument was heard in the Second Circuit Court of Appeals on November 10, 1977 and a decision which affirmed the lower court's decision as to the City defendants, and reversed as to State defendants was rendered March 8, 1978. The Common Council of the City of Buffalo defendants filed a petition for rehearing and/or rehearing *en banc* on March 21, 1978. The petition was denied as to rehearing and rehearing *en banc* on May 26, 1978. The Board of Education and Superintendent of Schools of the City of Buffalo, defendants requested and received an extension of time in which to file their petition for a writ of certiorari to July 5, 1978.

B. Decision of the District Court

The District Court in its April 30, 1976 decision and order found that

> "the Board of Education, the Superintendent of Schools, the Commissioner of Education, and the Board of Regents have violated the plaintiffs' fourteenth amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system."

In support of this conclusion, the District Court made the following general findings of fact:

1. The racial impact of the language program (at East High School) was clearly foreseeable and the failure of the Board to amend this policy when it was obviously aware of its segregative impact is indicative that the Board intended that that segregative effect continue (Appendix at p. 36a).

2. The conflicting evidence is not sufficient to show racially segregative intent on the part of the City or the State defendants with respect to the siting of the Woodlawn Junior High School (Appendix at p. 48a).

3. The Board, in approving the district for Woodlawn Junior High School, fully understood that the result of adopting or creating such a district would be to populate the Woodlawn school totally with black students (Appendix at p. 48a).

4. The Board's transfer and optional areas policies were substantial contributing factors to the segregation at all levels of the Buffalo Public School System, and that this segregative impact was clearly foreseeable by the Board (Appendix at p. 64a).

5. The discriminatory actions of the Board with regard to admissions at vocational-technical high schools had caused segregated conditions to exist at a significant number of those schools (Appendix at pp. 68a-69a).

6. The Board of Education has purposefully followed a policy that has segregated and was intended to segregate the teacher and administrative staffs in the Buffalo Public Schools. The Court cited the failure of the Board to increase the minority teacher percentage, in any meaningful amount, in over ten years' time (Appendix at p. 76a).

7. The Board of Education and the other City of Buffalo officials were encouraged to continue their segregative actions by the Commissioner of Education's failure to discharge his responsibilities under the laws of the State of New York and the Constitution (Appendix at p. 78a).

8. The Court claimed that the City defendants' past action and inaction which have, to a substantial degree, caused, exacerbated or maintained the segregated housing conditions, are separate and independent alternative grounds for holding them constitutionally liable for the segregated condition of the schools in Buffalo (Appendix at p. 114a).

C. Decision of the Court of Appeals

The Circuit Court's decision imposes an affirmative duty to achieve racial balance in the Buffalo schools.

The District Court found the Buffalo Superintendent of Schools and the members of the Buffalo Board of Education, in their official capacities, and the New York State Commissioner of Education and the members of the Board of Regents of the State of New York, in their official capacities,

liable for "intentionally causing and maintaining a segregated school system" in violation of the equal protection clause of the Fourteenth Amendment and 42 USC § 1983. *Arthur v. Nyquist*, 415 F Supp 904, 969 (W.D. N.Y. 1976). The Circuit Court affirmed the judgment of the District Court with respect to the city appellants and reversed the judgment of the District Court with respect to the state appellants. *Arthur v. Nyquist*, 573 F2d 134 (2d Cir 1978).

Appellants argued that the District Court used an erroneous legal standard in determining that city and state officials acted with segregative intent. The Circuit Court adopted the standard used in *Hart v. Community, School District Board of Education*, 512 F2d 37 (2d Cir 1975). The *Hart* standard provides that:

> *** a finding of *de jure* segregation could be based on acts of omission or commission undertaken by government authorities, which have the "natural and foreseeable consequence of causing educational segregation."
> 573 F2d at 141.

The Court rejected appellants' argument that the United States Supreme Court's vacation and remand of *United States v. Texas Education Agency*, 532 F2d 380 (5th Cir 1976) must be taken to implicitly criticize *Hart. Austin Independent School District v. United States*, 429 US 990 (1976) (*per curiam*). In addition, the Court implicitly refused to adopt the standard of segregative intent espoused in *Arlington Heights v. Metropolitan Housing Development Corp.*, 427 US 252 (1977).

In applying the *Hart* standard, the Circuit Court found that the "natural and foreseeable consequence" of the Buffalo Board of Education's policies concerning language transfers, zoning, optional attendance areas and staff recruitment and assignment was increased segregation of the Buffalo public schools.

D. Facts

Buffalo has seen the racial composition of its citizenry change dramatically over the past 30 years. Between 1950 and 1970 the total population dropped by 126,000 while the black percentage rose from 6.5% to 21% (Appendix 81).

In the 1930's and 1940's blacks moved into the lower east side which is commonly referred to as the Ellicott District. Since then, the black population increased and moved in a northeasterly direction. This pattern of residency is clearly portrayed by viewing Hutchinson-Central High School in 1953, the district high school for most black students. In 1973 Kensington and Bennett were racially balanced with heavy resident black populations.

This residential pattern is also reflected when one considers that all the predominantly minority schools, with the exception of Schools No. 16 and No. 17, are in this area. This is also clearly reflected in the census figures.

The Buffalo School System has never operated as a dual system under mandate of law. To the contrary, in 1900 the New York State Legislature enacted an Anti-Segregation Law (N.Y. Educ. Law, § 3201 [McKinney's 1970]). The system as a general rule has traditionally operated on an assignment basis that requires children to attend neighborhood schools. This is not the rule for vocational schools which draw students voluntarily on a city-wide basis.

As of the 1973-1974 school year, the Buffalo School System consisted of 77 elementary schools, two middle and four junior high schools, 7 academic and 6 vocational-technical high schools. The student enrollment was 61,060. The racial balance was slightly in excess of 50% majority. There admittedly exists racial imbalance in the system as is reflected in the following figures.

TABLE I

ELEMENTARY SCHOOLS 80-100% MINORITY ENROLLMENT (OCT. 1973)

School (Grades)	*Minority*	*Majority*	*Total*
6 (PK-6)*	801 (100%)	0 (0%)	801
8 (PK-6)*	777 (99.9%)	1 (0.1%)	778
12 (PK-6)*	230 (100%)	0 (0%)	230
16 (PK-6)	178 (90%)	19 (10.0%)	197
17 (PK-6)*	465 (99.4%)	3 (0.6%)	468
23 (K-5)	697 (91.8%)	62 (8.2%)	759
31 (K-8)*	828 (99.2%)	7 (0.8%)	835
Build (former 32)* (PK-6)	575 (99.7%)	2 (0.3%)	577
35 (Special)	76 (96.2%)	3 (3.8%)	79
37 (PK-8)*	809 (99.9%)	1 (0.1%)	810
39 (PK-6)*	927 (100%)	0 (0%)	927
41 (PK-6)*	371 (100%)	0 (0%)	371
47 (PK-6)*	272 (100%)	0 (0%)	272
48 (PK-5)*	396 (99.7%)	1 (0.3%)	397
50 (Special)	99 (100%)	0 (0%)	99
53 (PK-6)*	880 (99.9%)	1 (0.1%)	881
59 (K-5)	566 (98.3%)	10 (1.7%)	576
62 (K-7)	712 (92.5%)	58 (7.5%)	770
74 (PK-6)*	626 (98.9%)	7 (1.1%)	633
75 (PK-6)*	363 (100%)	0 (0%)	363
90 (K-6)	512 (89.3%)	61 (10.7%)	573
93 (K-3)*	99 (100%)	0 (0%)	99

* The schools marked with an asterisk are schools that were predominantly black in 1965 when Commissioner Allen rendered his decision in the *Yerby Dixon Proceeding*.

TABLE II

ACADEMIC HIGH SCHOOLS
(OCT. 1973)

School	*Minority*	*Majority*	*Total*
Grover	465 (22.7%)	674 (59.2%)	1139
East High	1622 (99.0%)	17 (1.0%)	1639
Riverside High	232 (15.1%)	1301 (84.9%)	1533
South Park High	245 (12.7%)	1683 (87.3%)	1928
Bennett	696 (43.3%)	899 (56.0%)	1606
Kensington	827 (43.0%)	1093 (56.8%)	1923

SOURCE: PX 6, at 22.

VOCATIONAL-TECHNICAL HIGH SCHOOLS
(OCT. 1973)

School	*Minority*	*Majority*	*Total*
Fosdick-Masten	576 (98.1%)	11 (1.9%)	587
Hutchinson-Central Technical	223 (19.8%)	902 (80.2%)	1125
McKinley	235 (20.3%)	922 (79.7%)	1157
Seneca	222 (20.0%)	891 (80.0%)	1113
Burgard	448 (40.6%)	598 (54.2%)	1103
Emerson	244 (43.6%)	314 (56.0%)	560

SOURCE: PX 6, at 23.

TABLE III

MIDDLE AND JUNIOR HIGH SCHOOLS
(OCT. 1973)

School	*Minority*	*Majority*	*Total*
*Fillmore Middle	690 (89.0%)	85 (11.0%)	775
West Hertel Middle	332 (28.4%)	837 (71.6%)	1169
Clinton Junior	846 (100%)	0 (0%)	846
*Genesee Humboldt Junior	932 (90.9%)	93 (9.1%)	1025
Southside Junior	202 (15.4%)	1107 (84.6%)	1309
Woodlawn Junior	764 (99.6%)	3 (0.4%)	767

SOURCE: PX 6, at 21.

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* Fillmore Middle School and Genesee-Humboldt Junior High School were opened as majority schools. The first statistical record of racial breakdowns is 1966. At that time, Fillmore was 42.4 percent minority and Genesee Humboldt was 31.5 percent minority.

A summary of the preceding tables shows that 22 of the 77 elementary schools were predominantly black. This was also true of East and Fosdick Masten High Schools, Woodlawn, Genesee-Humboldt, Clinton Junior High Schools, and Fillmore Middle School.

Yerby Dixon Proceeding

In 1964, the Commissioner of Education, Dr. James Allen, in the Yerby Dixon Matter, determined that the Buffalo Public School System was racially imbalanced and ordered that Buffalo submit a plan to alleviate said racial imbalance.

In the Opinion and Order the Commissioner says:

> "Involved in the ultimate solution to *de facto* segregation in a school system, of course, the elimination of segregated housing, slum conditions and other un-

desirable socio-economic conditions which lie beyond the control of the Board of Education or of the Commissioner."

Subsequently, Federal District Judge Henderson upheld the statutory power of the Commissioner to make such an Order and importantly, made the first judicial determination regarding the character of the segregation in the Buffalo School System.

On page 130 of that decision the Court said:

"Prior to the Commissioner's Order and adoption of the resulting plan, the City of Buffalo schools were operated along neighborhood lines without regard to the racial composition of the neighborhood which a given school might be scheduled to serve. Through the years, socio-economic factors had resulted in a concentration of the negro population of the city which, in turn, resulted in several of the city's schools becoming predominantly attended by negro pupils."

"Such a condition, commonly referred to as *de facto* segregation, was and is common under the neighborhood school system in effect in many cities throughout the country." [*Offerman v. Nitkowski*, 248 F. Supp. 129 (1965)].

High Schools

The thirteen high schools in the system are divided into two categories, 7 academic and 6 vocational. The academic schools operate on an assignment district basis and deal in general education; whereas, the vocational schools accept students from anywhere in the City and specialize in various skills depending upon the particular school, in addition to the general educational components. The ratio of blacks to whites in each of these schools is shown hereinbefore in Table II.

Only East and Fosdick-Masten High Schools are racially imbalanced minority schools.

In the early 1950's Fosdick-Masten was an academic high school with an integrated student population. It was closed as an academic school and opened as a vocational school with courses that were attractive mostly to girls. It became commonly known as a Girls' Vocational School. There were no racial records kept in those days, but from all indications the school opened integrated. The neighborhood in which the school was located in subsequent years became overwhelmingly black. None of the other vocational schools were as of 1973 more than 50 percent minority.

By 1964, East was predominantly minority. But it cannot be definitely ascertained the actual progression of racial change yearly from the white school of the early fifties to the black school of the 1960's. The lower Court found in this regard "that East is now and has been, at least since 1960, an indentifiably black school". The first known records indicate that in the school year 1966, 73 white students transferred out of East High School. During the ensuing years white students continued to transfer from East in varying numbers, the largest being 176 in 1970 (Defendants' Exhibit 8). This exhibit shows that during the years 1966-1971, a total of 625 whites and 530 blacks transferred out of East High School.

A change in this policy was made in 1972, prohibiting white students in the East High School District from transferring out for the purpose of taking a language at another school. This change of policy did not improve the racial balance at East High School.

There were certain boundary changes in the East High School district prior to 1966. These boundary changes are set forth on pages 30-31 of the Decision and Order.

Transfers and Option Zones

The Buffalo School System permitted students to transfer from one assignment district to another for well-defined reasons. The District Court recognized the need for such a policy to provide the flexibility necessary to operate such a large school system. This transfer policy, in effect for many years, predated racial considerations in the system. Of course, racial reasons were never the stated reason on the application for transfer. The reasons stated were always legitimate, *e.g.*, medical reasons accompanied by doctor's certificates.

The above applies also to option zones.

Junior High and Middle Schools

The Buffalo School System has four junior high schools, Woodlawn, Clinton, Genesee-Humboldt, and Southside. At the time of trial, Southside, which was located in a virtually all white neighborhood, was 11.5% minority. The year before, it was 15.6%. The lion share of this minority representation was contrived to make the school integrated. Clinton, Woodlawn, and Genesee-Humboldt were at the time of trial virtually all black. Clinton was located in the first all black neighborhood and was predominantly black from its inception in the early 1950's. Genesee-Humboldt located in a changing neighborhood was in 1966, the first year of record keeping, only 31.5% minority. From the school year 1966 to 1973, Genesee-Humboldt saw its white enrollment drop from 749 to 93. Woodlawn was black from inception. These schools have been feeders to East High School. They did not have a language transfer policy.

West Hertel Middle School was opened as an integrated school (26.1%) black and here the integration was a result of action by the Board. Fillmore Middle School was in 1966

(42.4%) black. At the time of trial, it was 88.0% black. From 1966 to 1973 this school lost 452 white students. Fillmore has also fed into East from inception.

Compliance with State Mandate to Improve Racial Balance

In 1965 Commissioner Allen directed that the "de facto" segregation (racial imbalance) in the system be corrected. The school system thereafter did take steps to correct this racial imbalance. There is little doubt, and the Commissioner at trial so admitted, that correcting racial imbalance could only be accomplished through the extensive use of involuntary bussing.

The School Board, however, did take steps to correct racial imbalance. At the time of trial, of the thirteen high schools, only two had more than 50% black student enrollment, six were racially balanced, and none had less than 10% minority enrollment. Much of this was accomplished through the use of boundary changes and by permitting blacks to transfer out of all black East High School.

At the time of trial approximately 3000 black elementary students yearly were being transported on a voluntary basis from predominantly black schools to majority schools. These students upon graduation could attend the high school which the receiving school fed into, instead of the high school in his or her district, most likely East.

In the early 1950's East High School was predominantly white. Correspondingly, the East High School assignment district was predominantly white. At this point in time, the black population was increasing and moving from the southeast of the City in a northeasterly direction. The East High School district changed racially because of this dramatic residential change. The lower Court acknowledges these factors.

Certain languages, such as French, Spanish and Latin, have been taught at all academic high schools. Because of the usually small demand for other languages, they were only offered at schools where there is a demand. Students were permitted to transfer to a school where the subject was offered if they desired.

This policy was formulated without any concern for racial imbalance but was based on the need to respond affirmatively to legitimate demands for such courses of study.

In 1960 Polish was dropped at East High School. The District Judge took judicial notice that many Polish families reside in this district and would want the course.

The Buffalo School Board purchased 22 portable classrooms and located the same at majority schools, enlarging the capacity of those schools to make room for inner-city black students for integrative purposes.

Extensive compensatory educational programs have been initiated with the major emphasis being in the inner-city area.

Improvements of consequence have been made to recruit black teachers and to promote those already in the system to higher positions on the administrative staff.

West Hertel Middle School, the only new school constructed in the system in the last decade, was changed from a junior high school before opening in order to better balance the student body.

Common Council Actions

Under New York State Law, the Buffalo Board of Education is autonomous. They, however, must rely upon the City of Buffalo for funding whether it be for operation and maintenance or capital improvements. The District Court found that the Common Council by certain intentional

discriminatory actions and non-actions, contributed to and continued the racial segregation in the schools.

The School Board sought initial funding for the West Hertel Middle School for the stated purpose of constructing a junior high school. This school was needed to alleviate overcrowding at Riverside High School in the northwest section of Buffalo. When construction was virtually completed, the School Board for integration purposes changed the component to a middle school. For a number of weeks the Common Council failed to provide the funds necessary for completion of the school. The District Court found that this delaying action was racially motivated. Although the money was eventually appropriated by the Council, the school was completed, and it opened as an integrated middle school, the District Court found this was evidence of an invidious intent to discriminate.

There was also the matter of the portable classrooms. The Common Council adopted an ordinance prior to the purchase of the portables by the Board, prohibiting the construction of additions to school buildings if the addition was of a material different from the main building. The legality of this measure was litigated in the state Courts and ultimately held to be beyond the power of the Council to adopt. Here again the integrative action became a reality.

The Common Council, although asked by the Board to do so, never appropriated funds for the planning of additional middle schools which schools were part of the School Board's plan to improve racial balance. The plan called for six such schools that would cost an estimated six million dollars each. It is important to note here, that the West Hertel Middle School was the only new school constructed in a decade because of the financial problems of the City.

The plaintiffs further charged that the Common Council refused to adopt a housing law prohibiting discrimination in housing beyond that which is prohibited by the Federal Government and State of New York. New York State has probably the most extensive housing law in the country.

Woodlawn Junior High School

Woodlawn Junior High School was built in the early 1960's after strong urging by the black community. It was located on East Ferry Street and Michigan Avenue one block east of Main Street, which at that time was somewhat of an artificial boundary for blacks and whites. The plaintiffs charged that the School Board, in choosing this site, knew that the school would be segregated upon opening. They further charged that when establishing the district the School Board drew a boundary that assured that the school would open as a segregated school. The District Court found that because of the recent migration of blacks into the Woodlawn area (late 1950's), many of the elementary schools in that area, were all predominantly black, overcrowded and were not in good condition. He additionally found that the black community generally wanted a new school in that area to service the needs of that area and concluded that based on the evidence, the School Board was not racially motivated in selecting the site.

When the school was complete, many hours of discussion occurred as to what would be the district boundaries. There were a number of plans submitted by Board members and the one adopted extended across Main Street into predominantly white neighborhoods. However, when this plan was adopted, an option zone was created for the area west of Main Street. This plan went into effect and when the school opened, it opened virtually all black.

Staff

Buffalo like New York City is required by State law to give an examination to all its teacher applicants. In May, 1965, Commissioner Allen found that there was no substance to the charge that there was discrimination in the hiring and assigning of teachers and staff in the system. There has never been any school in the system that had a faculty that was all black. With the exception of School No. 32, also known as the BUILD Academy, no school in the system had a faculty of minority teachers exceeding 32 percent. BUILD Academy is a school that operates under special agreement between the school system and the BUILD Association. The BUILD Association is virtually an all black association and pursuant to said agreement had a veto power over the faculty. Until the School Board in the early 1970's adopted a practice of prohibiting white teachers from transferring out of minority schools, transfers were permitted on the basis of seniority.

REASONS FOR GRANTING THE WRIT

I. The Circuit Court has intensified a conflict among the circuits and misapplied applicable decisions of this Court.

A. The Circuit Court Decision Highlights a Conflict Among the Circuits as to the Meaning of "Intent" in School Desegregation Cases.

Lower courts have struggled with the interpretation and application of the "purpose or intent to segregate" concept since it was first stated by this Court in *Keyes v. School District No. 1, Denver, Colorado*, 413 US 189 (1973). The Second Circuit in *Hart v. Community School Board of Education*, 512 F 2d 37 (2d Cir 1975), held that a "foreseeable consequences test" meets the requirement of intent established in *Keyes*. The Fifth, Eighth and Seventh Circuits have agreed with this in-

terpretation. *US v. Texas Education Agency*, 532 F 2d 380 (5th Cir, 1976), vacated *sub nom. Austin Independent School District v. US*, 429 US 990 (1976) *per curiam; United States v. School District of Omaha*, 521 F 2d 530 (8th Cir, 1975), cert denied 423 US 946 (1975); *US, et al. v. Board of School Commissioners of Indianapolis, Indiana, et al.*, ... 1978.

The Ninth Circuit has consistently disagreed and required that racial motivation be proven. *Berkelman v. San Francisco Unified School District*, 501 F 2d 1264 (9th Cir, 1974); *Johnson v. San Francisco Unified School District*, 500 F 2d 349 (9th Cir, 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F 2d 579 (9th Cir, 1973) cert denied 416 US 951 (1974).

This Court has addressed the issue of segregative intent since the *Hart* decision in 1975. In *Washington v. Davis*, 426 US 229 (1976); and *Village of Arlington Heights v. Metropolitan H.D. Corp.*, 429 US 252 (1977) this Court held that disproportionate impact is not enough and that a discriminatory purpose must be shown. This Court later applied the standard established in these cases to school desegregation cases in *Dayton Board of Education v. Brinkman*, US (1977); *School District of Omaha v. US*, US (1977); and *Brinkman v. Armstrong*, US (1977).

In affirming the District Court's decision, the Second Circuit has reaffirmed its foreseeable consequence standard of intent.

B. The Courts Below Misinterpreted Decisions of this Court.

The District Court in its original decision of April 30, 1976 chose to follow the method of determining intent adopted by the Second Circuit in *Hart v. Community School Board*, 512 F 2d 37 (2d Cir, 1975) that it is enough to show "that the probable and foreseeable result of defendants' acts was segregation."

In reviewing the evidence under six elements of the plaintiffs' case, the Court determined that because the activities in question had a naturally foreseeable impact upon racial imbalance, they were, therefore, done with a segregative or discriminatory intent or purpose.

City appellants moved the District Court to reconsider its original decision in light of the new and stricter standards laid down by the Supreme Court in *Washington v. Davis* and *Arlington Heights* to be followed by the Courts in deciding questions of segregative intent. The District Court agreed and by decision and order dated March 1, 1977, reaffirmed its original decision in all respects.

The District Court in its reconsideration opinion stated:

> "To the extent that the *Hart* standard suggested that mere cause and effect, mere analysis by way of a 'reasonable and foreseeable consequences' test which amounts to a finding that disproportionate impact is sufficient to impose liability for school segregation under the fourteenth amendment, it is refuted by *Washington v. Davis* and *Arlington*." (Appendix at 154a).

The District Court also said it understood that the Supreme Court had made clear the "necessity" of establishing that the "motive behind actions or inactions and not the resultant impact alone, is determinative when a constitutional violation is alleged." (Appendix at p. 154a).

However, in approaching its reconsideration, the Court said the issue was whether

> "the defendants intentionally acted or *refused to act* so as to segregate and maintain the segregated conditions of the Buffalo Public School System, or did it find a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent." (Appendix at p. 155a) (Emphasis added).

There are two problems with this formulation. The first is that the District Court continued to view omissions, failures to act, or refusals to act by the School Board as proper evidence justifying an inference of segregative intent. Appellants maintain that omissions in themselves are not relevant evidence of a segregative intent unless the same degree of deliberate and factual segregative motive is clearly established. Second, the Court misapplied the holding of *Washington v. Davis, supra.* The District Court said the issue was whether it had found a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent (Appendix at p. 155a). *Washington* held that in cases alleging a constitutional violation, there must be a specific finding of a discriminatory purpose and that official actions having a disproportionate racial impact cannot in themselves be a basis for inferring that such actions were motivated by a purpose to discriminate or segregate on the basis of race. This clarification is important because City appellants maintain that in both its original decision and its reconsideration, the District Court in fact found a discriminatory intent in regard to a significant portion of the Buffalo Public School System on the sole basis of the alleged disproportionate racial effect of certain acts or omissions of the School Board and City Council.

In *Arlington*, this Court clarified the tests for the required finding of discriminatory purpose or motive. Although racial impact could be a starting point, it seems clear from the other indicia mentioned that more than an objective reasonable man standard of legal fault of negligence cases is necessary. The Court in *Arlington* specifies legislative history, unexplained and abrupt departures from past practice and personal admissions of the target public officers as a basis for the required inference of an illicit motive. *Arlington, supra,* p. 13. Such evidentiary tests mean that the character of the racial purpose justifying a finding of liability is of a subjective and not objective quality. Thus, by indicating as clearly as it has in *Arlington* that the illicit purpose must have existed and motivated the official segregative actions, the Court implicitly rejects a rule that would impose liability as if the officials were so motivated despite, in fact, being racially neutral. A brief review of the evidence and conclusions of the District Court illustrates its findings and conclusions are founded upon the objective foreseeable effect test of *Hart* and not the subjective motive or purpose test of *Arlington*.

Although the District Court stated that it used the standard of intent announced in *Keyes* in addition to the foreseeable consequences test, (App. p. 22a) the Circuit Court makes it clear that both courts used the objective, foreseeable consequences test exclusively, in determining liability. The Circuit Court stated,

> "We are confronted here with a pattern of action and inaction the natural and foreseeable consequence of which is the increased segregation of the Buffalo Public Schools." (App. p. 182a).

The results of the lower Courts' use of the objective reasonable man standard are conclusions that the Buffalo Board of Education and City of Buffalo officials intentionally operated a segregated school system in violation of plaintiffs civil rights based upon the effect or impart alone of governmental actions or the foreseeable results of government inaction. This result is clearly contrary to this Court's holdings in *Washington v. Davis, supra, Arlington Heights, supra,* and *Dayton*.

The use of this foreseeable consequences test broadens the scope of the violation without the necessary considerations mandated by this Court in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). It is possible to find systemic segregation based upon foreseeable impact or possible consequences without having to find actions or conduct which was intended to effect the entire system.

C. The District Court misinterpreted prior law in its use of evidence related to independent governmental actions as furthering discrimination in residential housing patterns within the City.

Throughout the District Court's opinion and particularly at section IV-H (Appendix at p. 101a), the Court relies extensively upon the actions of the United States Government, the Federal Housing Administration in particular, the Buffalo Municipal Housing Authority and the "Real Estate Industry", none of which were parties to the action, to provide a factual basis for a finding of discriminatory intent and, therefore, a segregated school system. This analysis is without legal foundation and further, the conclusions of segregative intent and a dual system thus derived are not supported by the evidence upon which the District Court relied.

The District Court relied upon activities of the above stated entities to supplement its finding that the racial concentrations in Buffalo's residential housing patterns were not the aggregate result of choices by private individuals but rather that the creation of racial ghettoes was directly attributable to the combined policies of the real estate industry, the Federal Government and the Buffalo Municipal Housing Authority. Therefore, in the District Court's view, the Buffalo Public School System's long standing neighborhood school policy could not be considered as racially neutral. Since the segregated residential patterns outlined by the District Court were thus in the Court's eyes the result of governmental action, for Fourteenth Amendment purposes, it follows, according to the District Court, that the racial imbalances thereby generated within the respective public schools were similarly inspired by this hybrid form of state action (Appendix at p. 113a).

Further, by applying the animus of racial discrimination to the motives and purposes of these various unrelated public and private organizations, the Court finds that such racial

separation within the Buffalo Public School System resulted from state action animated by segregative intentions, thereby further justifying its conclusion that the City defendants, although separate and distinct from the aforementioned agencies, maintained an unconstitutional school system.

Such judicial reasoning is unsupported in law or fact. To hold the defendant school Board responsible for the conduct of such outside groups and agencies over a period beginning over 40 years prior to trial is clearly erroneous. Such an analysis was invoked in other recent desegregation cases most notably, *Hart v. Community School Board*, 383 F. Supp. 699 (E.D.N.Y. 1974) and *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143 (W.D. Mich. 1973). But the use of unrelated governmental conduct to bolster a finding of state action has not been sanctioned by this Court* and specific actions cited by the District Court below are too insubstantial and remote even if such actions are held to be legally material. In *Milliken v. Bradley*, 418 U.S. 717 (1974) this Court took care to state that it had not relied upon "testimony pertaining to segregated housing . . . [and] accordingly . . . the case does not present any question concerning possible state housing violations. *Milliken, supra* at 728 N.7.

City appellants also submit that the affirmances of the decisions in *Hart* and *Oliver, supra*, by the Second Circuit and

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* Justice Powell's concurrence in *Austin Independent School District v. United States* is instructive:

> "The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. *For example, discrimination in housing—whether public or private—cannot be attributed to school authorities.* Economic pressures and voluntary preferences are the primary determinants of residential patterns." (Emphasis added) 429 U.S. 990 (1976).

the Sixth Circuit respectively, expressly refrained from reliance upon the housing analyses used by the District Courts.

The District Court sought to justify its reliance upon the housing evidence by using it to reject defendants' position that such housing patterns caused the racial imbalances in the school system. Regardless of the District Court's rationale, it is clear from its opinion and the plaintiffs' proof that the governmental policies claimed to have caused segregated housing patterns were crucial to both the plaintiffs' case and the District Court's findings. For without a linkage between the evidence concerning residential housing patterns and the School Board's educational policies, the District Court's other findings of segregative purpose are without meaning. This is so because those factors, addressed throughout the District Court's opinion, could not alone account for the degree of racial imbalance in various schools within the system so heavily relied upon by the District Court in drawing its conclusion that the entire Buffalo Public School System was unconstitutionally segregated.

This fallacy is especially evident in the District Court's analysis of this part of the case. In sourthern school desegregation cases which operated dual school systems under positive law, school boards were obliged to redraw school boundaries after the *Brown* decision of 1954. But it was usually the case that similar *de jure* segregation existed in housing in such communities as well. Thus, those boards could not create so-called racially neutral neighborhood school districts.

This circumstance stands in dramatic contrast to the situation in northern cities, especially like Buffalo in New York State, that have no history of *de jure* segregation either in housing or schools. Buffalo's public school attendance zones were generally established long before the problem of

racial discrimination in either housing or schools became an issue. Thus, it was the gradual change in housing patterns that in turn created racial imbalances in the respective schools and not a policy of the Board of Education to alter attendance zones to lock minority students into certain schools.

It is, therefore, critical that housing arguments relied upon by the Court be carefully reviewed. However, the Circuit Court failed to consider the issue in its opinion.

II. The Circuit Court misapprehended the legal responsibilities of the State and City Defendants with respect to education and applied inconsistent standards of intent to the City and State Defendants.

(A) The Legal Responsibilities for Education of the Board of Regents, Commissioner of Education and the Common Council of the City of Buffalo.

The powers of the Board of Regents and the Commissioner of Education are described in Judge Curtin's Decision (A-78a). Full power over education is constitutionally vested in the State and specifically in the Department of Education which "is charged with the general management and supervision of all public schools and all of the educational work of the State," NY Education Law, Sec. 101. The Appellant Board of Regents is the governing body of the University of the State of New York, NY Education Law, Sections 201 and 202. The Board of Regents is also the statutory head of the Department of Education, and the Commissioner of Education, who serves at the pleasure of the Board of Regents, is the chief administrative officer of the department, NY Education Law, Sections 101 and 303.

The Commissioner has the responsibility for enforcing all laws relating to education and for executing all educational policies adopted by the Board of Regents. He has general supervision over all elementary and secondary schools, in-

cluding those in the public school system of Buffalo. The Commissioner is also granted judicial authority to hear appeals from aggrieved persons, and his decision "shall be final and conclusive, and not subject to question or review in any place or court whatever," NY Education Law, Section 310 (A-79a); and the Regents may adopt rules giving the Commissioner such additional powers and duties as may be required for the effective administration of the State system of education, NY Education Law, Section 301.

Section 306 of the NY Education Law gives the Commissioner the power to remove any school officer or member of a board of education who willfully disobeys any decision or order of the Commissioner of Education and to withhold from any district or city its share of the public money of the State for such disobedience.

The Board of Education for the City School District for the City of Buffalo, New York is a creature of State law and its members perforce are State officers. Board of Education members are not agents of the City government nor can the City exercise control over them.

The Common Council of the City of Buffalo is the City's legislative body and by virtue of State law cannot exercise any legislative role in the formulation of educational policies in the City of Buffalo. Although required by law to make an annual lump sum appropriation to the Board of Education so that the Board can discharge its responsibility to the pupils of the Buffalo Public School System, the New York State Education Law and the State courts make it clear that the Common Council cannot mandate how the Board of Education is to use the money (See Section 2576 of the NYS Education Law and *Fuhrman v. Graves*, 235 NY 77, 138 NE 743 [1923]).

The Circuit Court, in its March 8, 1978 decision, treated the Buffalo Board of Education and the City of Buffalo's Common Council as a single entity, the "City Defendants". They concluded that it is difficult "to imagine a set of facts, short of public admission of wrong doing, which would be more suggestive of intentional discrimination." Almost every act enumerated by this Court to substantiate this statement was a policy of the Buffalo Board of Education and as such was not subject to the control of the Common Council or other City officials.

It is clear that in New York State education is a State function with the ultimate responsibility vested in the Board of Regents and the Commissioner of Education. The City of Buffalo cannot be held derivatively liable for any judicially determined segregative acts of the Board of Education.

(B) The Circuit Court Applied Inconsistent Standards of Intent to the City and State Defendants.

Assuming for the purpose of this argument, that the objective, foreseeable consequences standard is correct, it is clear that the Circuit Court did not apply this standard consistently.

In finding the Buffalo Common Council guilty of segregative intent, both the Circuit Court and the Trial Court relied heavily upon the Common Council's failure to adequately fund programs which would have encouraged racial integration. Although the Council's record with respect to funding may be poor, only sheer speculation could lead one to the conclusion that if additional funds had been provided to the Board, they would have been used by the Board to desegregate the Buffalo Public School System.

As previously stated, the Circuit Court and the District Court applied a strict "foreseeable consequences" test from

the Court of Appeal's prior decision in *Hart*. While it may reasonably be maintained that there was substantial evidence of overt bigotry in occasional actions by the Common Council, as was revealed in the portable classroom controversy, no causative relationship was shown between that unworthy conduct and the segregated character of the school system.

The Circuit Court, in analyzing the Commissioner of Education's role, applied a less demanding standard than enunciated in *Hart*.

Referring to the State's role, the Circuit Court quoted its previous decision in Hart:

> "We assume mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation. To argue otherwise would be to adopt the strictly objective view of segregative intent . . . in effect making all continued toleration of segregation *de jure*."

This statement is correct in a situation where there is mere inaction and no corresponding duty to act. The Circuit Court in Judge Gurfein's opinion in *Hart v. Community School Board of Education, New York School District No. 21*, 512 F 2d 37 (2 Cir 1975) differentiated between "mere inaction without any affirmative action" and "omissions made by governmental authorities" (P. 50) or "inaction in the face of tendered choice." (P. 51). The instant case presents a clear situation of a government omission or failure of the State Defendants to fulfill an affirmative obligation to act. If the Buffalo Public School System was guilty of segregating its schools, then the Commissioner had a duty to enforce the federal and state Constitutions and the policy statements of the Board of Regents with respect to segregation in New York State schools. The record shows that the Commissioner was well aware of his powers under section 306 of the NYS Education Law and yet his office failed to use these powers.

The Commissioner's Office was given choices of actions which could have resulted in less segregation of the Buffalo Public School System and refused to take those actions. If as the Circuit Court found, the District Court did not err in finding that given the chosen policies of the state appellants, it was foreseeable that the Buffalo schools might remain segregated for an extended period of time, then applying the standard enunciated in *Hart*, the finding of the trial court that:

> "In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation [A-100a]"

should be affirmed.

The Circuit Court used a very subjective test when considering the inaction of the Commissioner of Education. The Court refers to the personal health of the Commissioner and "legitimate policy considerations" for absolving the Commissioner of any responsibility.

The Commissioner of Education heads a large department with an extensive administrative staff. As the District Court judge stated in his opinion:

> "Mr. Nyquist's excuse for not having brought a show cause order to make the *Yerby Dixon* decision a final order, that he was incapacitated by a heart attack, is not persuasive. The State's authority cannot be so dependent on the health of any one person, and New York State law authorizes the Deputy Commissioner to fill in for a disabled Commissioner."

The Circuit Court's subjective consideration of one official's role and excuses should not be determinative of the State agency's intent and is contrary to the Circuit Court's expressed standard of intent.

The Seventh Circuit Court of Appeals in its order on remand from the United States Supreme Court in the case of *US v. Board of School Commissioners of the City of Indianapolis*, 573 F.2d 400 (7th Cir. 1978), made this formulation employing the *Hart* standard:

> "It is clear, therefore, that discriminatory purpose for constitutional analysis is to be gleaned not from individual officials but from the relevant governmental institutions. As a subjective test would be impossible to apply in such circumstances, the courts are driven to adopt an objective criterion in determining whether the challenged state action is imbued with a segregative intent or purpose. Such criterion must include an examination of the institutional policy that underlies the action."

There is no evidence in the record of any "legitimate policy consideration" that would allow the Commissioner to do anything other than what was found by the Trial Court to be his express duty in the circumstances. Judge Curtin found upon reconsideration that:

> "from the Commissioner's actions over this extended time period, that contrary to the lip service paid integration, he intended that the situation continue unabated." (A-159a).

The Circuit Court and the Seventh Circuit have spoken out against a purely subjective test. The Seventh Circuit in its recent *Indianapolis* decision, stated:

> "[A subjective] test would pose an impenetrable evidentiary barrier for plaintiffs, for in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find. Because a subjective test fails to measure the presence of discriminatory purpose when officials act discreetly, it is an outdated tool in the enforcement of the Equal Protection Clause."

The Seventh Circuit Court like the Second Circuit Court in *Hart* recognizes the ultimate reality that in a world like ours which demands effective action in the face of formidable illegal challenge, words are not enough.

In conclusion, it is clear that there is no adequate explanation in the record for the Commissioner's failure to implement the Board of Regent's 1962 Desegregation Policy during the many years since that time.

Conclusion

This Court has made it clear since the *Keyes* case that a federal court conclusion of unconstitutional segregation in public schools must be based upon findings that school officials purposefully or intentionally acted to segregate students. Since that time, the Circuit Court stated, ". . . a number of divergent views on the meaning of 'segregative intent' have developed, which range from the highly subjective to the highly objective". App p. 175a Opinion, 2nd Circuit.

The Circuit Court in its opinion has stated that they have attempted to strike a balance between these competing theories in its foreseeable consequence test set forth in the *Hart* case. Although stating that they have considered *Washington v. Davis* and *Arlington Heights*, the Circuit Court maintains that the "foreseeable consequences" test is consistent with these decisions. This Court's decisions in *Dayton*, *Omaha* and the *Milwaukee* case strongly suggest that a more subjective standard is the correct test.

If this Court, in its recent decisions, has definitively established the test to determine the standard of intent then the Circuits must be told what the proper test is. The issue of school segregation is too important an issue to allow confusion as to the proper standard to continue to exist.

Petitioners pray that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOSEPH P. McNAMARA,
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Attorney for Petitioners.

Of Counsel:

Patricia Pancoe,
William E. Carey.

APPENDIX A

Order Adding Parties Defendant and Amending Title of Action

At a Motion Term of the United States District Court for the Western District of New York held in the U.S. Courthouse, Buffalo, New York on the 8th day of April, 1974.

Present: HON. JOHN T. CURTIN, *District Judge.*

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC., and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Plaintiffs,

against

EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO,

Defendants.

Civil Action No. 1972-375

The plaintiffs having moved the Court for an order making the Common Council of the City of Buffalo and its members as a party defendant, and the motion having been returnable on April 8, 1974, and the defendants JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUF-

Appendix A—Order Adding Parties Defendant and Amending Title of Action.

FALO and THE BOARD OF EDUCATION OF THE CITY OF BUFFALO having appeared by Anthony Manguso, Esq., Corporation Counsel, City of Buffalo by Anthony Gregory, Assistant Corporation Counsel, and the defendants EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, State of New York and THE BOARD OF REGENTS OF THE STATE OF NEW YORK having appeared by Louis J. Lefkowitz, Attorney General of the State of New York, Jean M. Coon, Assistant Solicitor General, upon the basis of an affidavit sworn to April 4, 1974 wherein no objection was made to the addition of the Common Council as a party but only if the Mayor of the City of Buffalo is also added as a party defendant, and the plaintiffs having orally moved the Court upon the return day to add the Honorable Stanley M. Makowski, Mayor of the City of Buffalo as an additional party defendant, and it appearing to the Court that said Common Council and Mayor of the City of Buffalo are persons whose presence is needed for a complete and just adjudication of the issues presented in this action, it is

ORDERED that the Common Council of the City of Buffalo and its members and the Mayor of the City of Buffalo, Stanley M. Makowski, be made parties defendant to this action, and it is further

ORDERED that the title of the within action shall be amended as follows:

Appendix A—Order Adding Parties Defendant and Amending Title of Action.

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC., and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Plaintiffs,

against

EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Defendants.

ORDERED that the defendants, STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO and the COMMON COUNCIL OF THE CITY OF BUFFALO shall serve their answer to the complaint herein within twenty (20) days after the entry of this order.

....., *United States District Judge.*

Date: .....

APPENDIX B

Decision and Order Granting Plaintiffs' Motion to Amend the Complaint etc.

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

APPEARANCES:

RICHARD F. GRIFFIN, ESQ., Buffalo, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (RUTH KESSLER TOCH, ESQ., Solicitor General, & JEAN M. COON, ESQ., Assistant Solicitor General, of Counsel), Albany, New York, and (EUGENE A. PAMFIL, ESQ., Assistant Attorney General, of Counsel), Buffalo, New York, for the Commissioner of Education, and the Board of Regents of the State of New York, defendants.

LESLIE G. FOSCHIO, ESQ., Corporation Counsel of the City of Buffalo (ANTHONY GREGORY, ESQ., Assistant Corporation Counsel, & FRANK A. SEDITA, JR., ESQ., Assistant Corporation Counsel, of Counsel), Buffalo, New York, for Mayor Stanley M. Makowski, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

When this school desegregation suit was filed in June of 1972, the plaintiffs named the Buffalo Board of Education, Dr. Manch, the Superintendent of Schools, the State Board of Regents, and Mr. Nyquist, the State Commissioner of Education, as defendants. Later, the plaintiffs moved to amend their complaint to add the Common Council of the City of Buffalo and its members, and the Mayor of Buffalo as party defendants. By order dated April 29, 1974, this motion was granted.

The trial of this action was held in October of 1974. The State defendants for the first time in their post-trial brief (Post-Trial Brief for State Defendants, at 3-5), argue that the Board of Education and the State Board of Regents are not "persons" within the scope of 42 U.S.C. § 1983, and, therefore, that the court lacks subject matter jurisdiction under 28 U.S.C. § 1343(3) with respect to them. There is no question that Dr. Manch and Mr. Nyquist were properly named as parties. .

In 1972, when this case was instituted, the law was clear that municipalities could not be sued for damages under § 1983, since they were not "persons." *Monroe v. Pape*, 365 U.S. 167 (1961). However, several court decisions interpreted *Monroe* to allow suits solely for equitable relief, such as the plaintiffs seek here, against municipalities. *See Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Adams v. City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961). This interpretation of the *Monroe* case was rejected in June 1973, when the Supreme Court decided the case of *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). In that case, the Court stated:

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the court held in *Monroe*, "Congress did not undertake to bring municipal corporations within the ambit of" § 1983, [365 U.S.] at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under [28 U.S.C.] § 1343.
> *Id.*, at 513.

Since the *Kenosha* case, several courts have explicitly ruled that school boards are not "persons" under § 1983. *See Monell v. Social Services of the City of New York*, Docket No. 75-7333 (2d Cir., March 8, 1976); *Adkins v. Duval County School Board*, 511 F.2d 690 (5th Cir. 1975); *Harkless v. Sweeny Independent School District*, 388 F.Supp. 738 (S.D.Tex. 1975).

The plaintiffs have now requested leave of this court to amend their complaint to add as parties-defendant in their individual and official capacities the present Superintendent of the Buffalo Schools, and the present members of the Buffalo Board of Education and the State Board of Regents.

The State defendants argue that this action by the plaintiffs will not cure the jurisdictional defect because of the recent Supreme Court case of *Rizzo v. Goode*, 44 U.S.L.W. 4095 (Jan. 20, 1976), which, in the State defendants' words, "held that for jurisdiction under § 1983, it is necessary to have as parties defendant the *actual* persons or officials who *acted* to deprive plaintiffs of constitutional rights." (State Defendants' Affidavit in Opposition, at 2). In addition, the City and State attorneys state that since these individuals would now be sued in their individual capacities, they do not represent them.

The State defendants read too much into the Supreme Court's decision in *Rizzo v. Goode, supra*. The Supreme Court said in *Rizzo* that, before injunctive relief may issue to remedy the deprivation of constitutional rights, there must be a showing that the responsible authorities played an affirmative part in the deprivation of those rights. At trial in *Rizzo*, there was a showing that constitutional rights were violated, but no showing that the named defendants participated.

The situation in *Rizzo* is different from the instant case, where plaintiffs allege that the State and City defendants denied them the equal protection of the laws by creating and maintaining segregated schools in the City of Buffalo, and where, at trial, plaintiffs attempted to prove that the Board of Education, through various devices, had segregated and maintained segregation in the schools and the staffs of Buf-

falo Public School System, and that the State defendants, who have the responsibility under the New York Constitution for public education, allowed the segregation to continue. The Supreme Court itself noted this difference between school desegregation cases and cases like *Rizzo*, when it said that there is a

> . . . critical factual distinction between their case [Rizzo] and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities . . . whereas in the instant case [Rizzo] the District Court found that the responsible authorities had played no affirmative part in depriving . . . any constitutional rights.
> *Id.*, at 4100.

Therefore, the defendants' reliance on *Rizzo* is misplaced.

The Second Circuit in *Monell, supra,* has stated that "[t]here is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of § 1983 when sued for injunctive or declaratory relief." (Slip Op., at 2420). There is a recognition here of the fiction inherent in the case of *Ex Parte Young*, 209 U.S. 123 (1908), in which the Supreme Court ruled that although a state cannot be sued under the eleventh amendment, a suit can be maintained against a state official. The requirement of suing "persons" instead of municipalities or agencies under § 1983 is a further extension of this same fiction. Although a school board itself cannot be sued, individual members can be. And, once the individuals are named, the suit proceeds as if it were against the school board as a separate entity. Indicative of this fiction is the statement of the Supreme Court in *Keyes v. School District No. 1*, 413 U.S. 189, 210-211 (1973):

> The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

In other words, it is the actions of the school board, and not just the present board members, that are considered by the courts. If the law were otherwise, a school board or other entity could escape responsibility by a change of members whenever suits arose.

Federal Rule of Civil Procedure 15(a) states that "leave [to amend] shall be freely given when justice so requires." Rule 15(c) allows an amendment that changes the party against whom a claim is asserted to relate back to the date of the original complaint if the claim in the amended complaint arose out of the conduct set forth in the original complaint and

> the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 19 states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the

> subject matter of the action, shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties. . . .

Rule 21 states:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

In addition, 28 U.S.C. § 1653 states:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Most notably, in *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974), some minority students sued the Dade County School Board and its superintendent seeking injunctive and declaratory relief against the use of corporal punishment. At the end of the trial in the district court, the defendant motioned to dismiss under Federal Rule of Civil Procedure 41(b). The district court granted the motion.

The plaintiffs appealed and, at the circuit court, the defendant school board argued that the court was without jurisdiction, citing *Kenosha, supra.* The Fifth Circuit stated:

> The District Court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant.
> *Ingraham, supra,* at 252.

In this case, had the individual defendants been properly named originally, the present members of the Board of Education and the Board of Regents would automatically have been substituted. Federal Rule of Civil Procedure 25(d).

Given the fact that in 1972, when this suit was instituted, it was not clear that a school board was not a "person" under § 1983, and given the fact that no defendant contested this point until the State defendants raised it in their post-trial brief, and that all defendants have been fully represented by counsel each step of the way, we feel that it would be a manifest injustice to deny the plaintiffs' motion. Plaintiffs have stipulated that they do not, and will not, seek attorneys fees from the defendants as private citizens in their individual capacities. Each individual defendant, as a member of either the Buffalo Board of Education or the New York State Board of Regents, is, and has been, fully aware of this lawsuit. As the Supreme Court stated in *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952), a case in which the plaintiffs petitioned for leave to add two new party plaintiffs in the Supreme Court, the Court stated:

> To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs to counter effective judicial administration—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below.
> *Id.*, at 417.

Attorneys for the State and City defendants have indicated that no new offer of evidence will be forthcoming if this motion is granted. For all the reasons stated above, plaintiffs' motion to amend the complaint is granted.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: April 30, 1976

APPENDIX C

Decision and Order Dated April 30, 1976

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH

Plaintiffs,

vs.

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York, JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Defendants.

Appendix C—Decision and Order Dated April 30, 1976.

Civ-1972-325

APPEARANCES:

RICHARD F. GRIFFIN, ESQ., Buffalo, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (RUTH KESSLER TOCH, ESQ., Solicitor General, & JEAN M. COON, ESQ., Assistant Solicitor General, of Counsel), Albany, New York, and (EUGENE A. PANFIL, ESQ., Assistant Attorney, of Counsel), Buffalo, New York, for the Commissioner of Education, and the Board of Regents of the State of New York, defendants.

LESLIE G. FOSCHIO, ESQ., Corporation Counsel of the City of Buffalo (ANTHONY GREGORY, ESQ., Assistant Corporation Counsel, & FRANK A. SEDITA, JR., ESQ., Assistant Corporation Counsel, of Counsel), Buffalo, New York, for Mayor Stanley M. Makowksi, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

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[1] INTRODUCTION

This court's decision in this case comes after a long and arduous journey through a complex lawsuit, in which the plaintiffs charge the defendants with "creating, maintaining, permitting, condoning and perpetuating racially segregated public schools in the City of Buffalo and in the Buffalo Metropolitan area." (Complaint, at 1). Plaintiffs allege a cause of action under 42 U.S.C. §§ et seq.[1] and the fourteenth amendment to the United States Constitution.[2] They seek declaratory and injunctive relief under 28 U.S.C. § 2201[3] and claim jurisdiction in this court under 28 U.S.C. § 1343.

It hardly needs to be pointed out that the Constitution and the laws do not forbid all types of discrimination. The fourteenth amendment prohibits only discrimination carried out under color of law: private discrimination, however regrettable or reprehensible, is not actionable under it. *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). This state action requirement presents no obstacle to the plaintiffs' case, since there is no question but that all the defendants are state agencies within the ambit of the fourteenth amendment's protection. *See United States v. Texas Education Agency*, 467 F.2d 848, 863 (5th Cir. 1972) (en banc); *Oliver v. Kalamazoo Board of Education*, 368 F.Supp. 143, 157-58 (W.D. Mich.), *aff'd* 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

At this point in the lawsuit, the only question before the court is whether or not any or all of the defendants have acted in such a manner as to segregate the Buffalo Public School System [hereinafter BPSS]. The question of remedy, *i.e.*, what action the court should take if it should find that the BPSS is segregated, is not before the court.

It should be emphasized that this court sits only as an arbiter of a legal dispute, not as a super-school board. It is this court's duty to safeguard the fourteenth amendment's guarantee of equal protection under the laws for all residents of the United States. The late Judge Murrah's words aptly describe the court's function in this lawsuit:

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication. *Stapleton v. Mitchell*, 60 F.Supp. 51, 55 (D.Kans. 1945), appeal dismissed, 326 U.S. 690 (1945).

At the outset, the court gratefully acknowledges the consistently professional cooperation exhibited by all parties to this lawsuit. One of the beneficial consequences of this cooperation was a series of 161 stipulations[4] upon which all parties agreed before the trial in this action commenced. This, of course, considerably reduced the burden on this court once the trial actually began.

The complexity and scope of the issues before the court must not be understated, however. The question presented—whether or not the defendants intentionally committed segregative acts affecting the Buffalo public schools—is one that calls for the strongest of emotions.[5] The final written record of this case gives some testimony to its complexity and to the fervor with which it was contested. Pretrial motions and discovery procedures consumed many months; the actual trial lasted ten days, with a transcript running 1,695 pages; parties submitted many pre-trial and post-trial briefs; some 180 exhibits[6] were admitted into evidence; and post-trial oral arguments were scheduled to facilitate a clear understanding of the positions and legal arguments of all parties.

It is, of course, the duty of this court to decide the facts from the evidence placed before it. Correlatively, it is the duty of this court to apply the law as it exists, both in the decisions of the Supreme Court and those of the Second Circuit in which this court sits. After carefully sifting through all the testimony, evidence, and argument, the court is now prepared to apply the applicable law to the facts as it finds them.

[5] I. THE PARTIES AND THEIR POSITIONS

This suit was instituted as a class action, with the named individual plaintiffs, black and white parents of public school children in the Buffalo metropolitan area, attempting to represent all others similarly situated. Although a class action is appropriate under Federal Rule of Civil Procedure 23(b)(2), the court believes that since little evidence was presented at trial regarding non-BPSS policies and practices, the certified class should be restricted to parents of children attending Buffalo public schools.

Also plaintiffs are the Citizens Council for Human Relations, Inc., a non-profit corporation organized under the laws of the State of New York, and the National Association for the Advancement of Colored People, Buffalo branch, organizations which seek, among other things, equal opportunity in education.

The defendants are Ewald Nyquist, the Commissioner of Education in New York State, The Board of Regents of the State of New York and its individual members [State defendants], Joseph Manch, Superintendent of Schools of the City of Buffalo at the time this suit was brought, and Eugene Reville, the present Superintendent, the Board of Education of the City of Buffalo and its members, the Common Council of the City of Buffalo and its members, and Stanley M. Makowski, Mayor of the City of Buffalo [City defendants].

Originally, the plaintiffs did not name the individual members of the Board of Education or the Board of Regents. By order of this Court dated today, the plaintiffs' motion to amend their complaint to include the individual members of these two Boards as parties defendant was granted.

The plaintiffs allege that the defendants, by various actions and inactions have caused the BPSS to become or remain severely segregated. Among the major allegations are segregation of staff, siting and construction of schools so as to promote segregation, manipulation of school district lines, optional zones and transfers for segregative reasons, failure to implement any meaningful integration plan, failure to hire significant numbers of minority group teachers, failure to promote significant numbers of minority individuals to supervisory positions, and failure to fund the proposed new East Side High School. Numerous other actions and inactions are alleged, including segregation of residential areas, and student assignment which incorporated this segregation. As a result of these actions of the defendants, plaintiffs claim that they have been denied the equal protection of the laws guaranteed to all citizens by the fourteenth amendment.

The City defendants, while acknowledging that many of the schools are racially imbalanced, insist that any imbalances are due to demographic shifts in housing patterns that are beyond their control. In addition, they contend that no affirmative action is required of them by the Constitution to alleviate the imbalances so caused. In adhering to their long-standing neighborhood school policy, which they argue is and has been racially neutral, the City defendants deny that they have violated the plaintiffs' constitutional rights.

The State defendants likewise admit that wide-spread segregation exists in the BPSS, but insist that they have done

more than is constitutionally required of them to end it. They also disclaim any responsibility for, or power to end, the segregated residential patterns in the City of Buffalo.

[9]

II. THE LAW

In 1954 the Supreme Court of the United States issued its famous decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which declared that laws requiring separate school facilities for blacks and whites—the separate but equal school doctrine—were unconstitutional. The Court ruled in that decision that such a system was "inherently unequal", and that such school segregation was a violation of the fourteenth amendment's guarantee of equal protection of the laws. 347 U.S., at 495. Although separate school facilities mandated by statute have long been outlawed in New York State,[7] this did not effectively prevent the slow emergence of separate educational facilities, as shown in tables 3 to 7, *infra*.

The law to be applied in this case has evolved through a series of Supreme Court and circuit court cases since *Brown* dealing with school segregation in many cities of our country, both North and South.[8] The essential elements, found in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), a case which involved the Denver public schools, can be reduced to a series of questions:

(1) Have plaintiffs shown that any of the Buffalo public schools are segregated?[9]

(2) If the answer to the first question is yes, have plaintiffs shown that any of this segregation was brought about or maintained by *purposeful* or *intentional* segregative acts by the defendants?[10]

(3) If question number 2 is answered affirmatively, have plaintiffs shown that a *meaningful* or *substantial* portion of the school district was so segregated?

All parties agree that the Buffalo public schools exhibit severe racial imbalance (City Defendants' Answer, at 2; State Defendants' Answer, at 2), and that "[i]n recent years, the degree of racial isolation in the Buffalo public schools has been increasing." (S-11). The defendants deny, however, that the segregated condition of the BPSS was intentionally or purposefully caused by them. In other words, the defendants argue that the schools are *de facto* segregated, not *de jure* segregated. As the Supreme Court has explained in *Keyes*, "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Keyes, supra*, 413 U.S. at 208 (emphasis in original).

In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or evenhandedness, or even "badness" or "goodness" on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in *Hart v. Community School Board*, 383 F.Supp. 699 (E.D.N.Y. 1974), *aff'd* 512 F.2d 37 (2d Cir. 1975), to show that the probable and foreseeable result of the defendants' acts was segregation. In *Hart*, the district court found that the school board had unconstitutionally segregated a school despite the court's specific finding that the school board was not racially motivated. The board appealed this decision. The Second Circuit stated:

> Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. *Hart, supra*, 512 F.2d at 50.

Furthermore, it is not necessary that the plaintiffs prove that the defendants' every action was discriminatory or that no positive action was ever taken by the defendants to promote integration. We are not dealing with absolutes. Isolated actions of constitutionally insignificant effect, whether of a discriminatory nature or such as to avoid or alleviate segregation, are not determinative. If fourteenth amendment rights are being denied, plaintiffs are entitled to relief. *United States v. Texas Education Agency, supra*, 467 F.2d at 873.

In this regard, we note the words of the Sixth Circuit in *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975):

> When constitutional rights are involved, the issue is seldom whether public officials have acted with evil motives or whether they have consciously plotted with bigotry in their hearts to deprive citizens of the equal protection of the laws. Rather, under the test for de jure segregation, the question is whether a purposeful pattern of segregation has manifested itself over time, despite the fact that individual official actions, considered alone, may not have been taken for segregative purposes and may not have been in themselves constitutionally invalid.
>
> . . .
>
> Benevolence of motive does not excuse segregative acts. 508 F.2d at 182-83 (citations omitted).

Some of the actions and events considered in this lawsuit occurred before many, or in some cases any, of the present public school children first attended school. The passage of time alone does not wipe the evidentiary slate clean, however. The Supreme Court has stated:

> . . . We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."
> *Keyes, supra,* 413 U.S. at 210-11.

If the plaintiffs prove that some schools were intentionally segregated by the defendants, the court must then decide whether the plaintiffs have shown that a substantial portion of the school district was so segregated. If the plaintiffs have proved that the defendants intentionally segregated a substantial part of the school district, this "creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities." *Keyes, supra,* 413 U.S. at 208. It is then incumbent on the *defendants* to prove that the other segregated schools are not the consequence of their illegal segregative actions as well. The burden so imposed on the defendants is considerable. Mere reliance on an "allegedly logical, racially neutral" course of action is insufficient. The Supreme Court has explicitly enunciated the standard:

> [The defendants'] burden is to adduce proof sufficient to support a finding that *segregative intent was not among the factors that motivated their actions.*
> *Keyes, supra,* 413 U.S. at 210.[11]
> (Emphasis added).

[15] III. BUFFALO AND ITS PUBLIC SCHOOLS

Buffalo's growth pattern has been similar to many other large cities of the northeast. Although the physical boundaries of the City of Buffalo have not changed significantly since the middle of the 19th century (PX 260, Pt. II, at 1), the population did not stop growing until a century later in 1950. In the quarter century since, the City has exhibited a steady population decline, due in large part to the familiar suburban migration.[12]

Many immigrants were attracted to Buffalo in the late 1800's, and the City retains strong ethnic concentrations to this day. The black population of Buffalo, negligible around the turn of the century, has grown steadily since World War I, receiving a strong impetus from the economic growth occasioned by the war industries during the 1940's.[13] As is typical of northern cities, the older central city has long been the locus of the black population, with movement slowly taking place to other areas of the city over the last two decades. Although some diffusion of black families throughout the 43 square miles of Buffalo has occurred, the number of blacks in suburban areas has been, and is, negligible.

The segregated nature of Buffalo's suburbs is glaringly evident when area public school districts are compared. The New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education reported in 1972 that

> [Buffalo's] surrounding suburbs are severely segregated. Of the 30 Erie County school districts, only six have over 1 per cent nonwhite students. Of these six, the only two districts with significant nonwhite student populations are Buffalo (46.6 per cent) and Lackawanna (19.2 per

cent). Akron, with a sizeable Indian population, has the third highest nonwhite population, representing 16 per cent of the total. (PX 305, at 4.44).[14] (Footnotes omitted).

As the City's population has dropped, the minority percentage has correspondingly increased, as shown in the following table.

TABLE I

POPULATION CITY OF BUFFALO

Years	*Total*	*% Non-White*
1950	580,132	6.5
1960	532,759	13.8
1970	462,768	21.0

SOURCE: PX 263, at 5; S-9.

At the same time, the BPSS has recorded a similar drop in its pupil population, with an even more striking percentage increase in non-white members,[14a] as the following table shows.

TABLE 2

BPSS STUDENT POPULATION

Years	*Total*	*Non-White*	*% Non-White*
1966	72,963	25,486	35%
1970	70,300	28,692	40.8%
1973	61,060	27,949	45.8%

SOURCE: PX 6, at 6.

The difference in years 1970 and 1973 is illustrative of this phenomenon—*i.e.*, the population, in absolute numbers, of minority public school children decreased, yet the minority percentage increased.[15]

The population drop is naturally reflected in school attendance figures. During the years 1966 through 1973, only ten of Buffalo's seventy-three elementary schools experienced an increase in enrollment. The rest noted declines ranging from negligible to severe. Total enrollment in those years dropped over 11,000, a percentage decline of approximately 23% from the January 1966 totals. Minority enrollment declined during that period by 525, while majority enrollment dropped by over 10,000 students.[16]

As of the 1973-1974 school year,[16a] the BPSS consisted of 77 elementary schools,[17] 4 middle and 2 junior high schools, 7 academic and 6 vocational-technical high schools. The pupil population in October 1973 was 61,060, of whom 53.3% were white, and 46.7% were non-white (S-10). The system has never been under mandate of law to operate a dual system along racial lines. In fact, New York State enacted an anti-segregation law for public schools in 1900.[18] Nevertheless, there exists substantial racial imbalance in the public schools. In 1973, 55 out of 77 elementary schools, 5 out of 6 junior and middle schools, and 7 out of 13 high schools were from 80 to 100% majority or minority, as tables 3 through 7 demonstrate. Statistics such as these prompted Commissioner Nyquist to state in April 1972 that "segregation [in the BPSS] is more severe now than it was seven years ago." [S-18(b)].

TABLE 3

ELEMENTARY SCHOOLS 80-100% MINORITY ENROLLMENT (OCT. 1973)

School (Grades)	*Minority*	*Majority*	*Total*
6 (PK-6)	801 (100%)	0 (0%)	801
8 (PK-6)	777 (99.9%)	1 (0.1%)	778
12 (PK-6)	230 (100%)	0 (0%)	230
16 (PK-6)	178 (90%)	19 (10.0%)	197
17 (PK-6)	465 (99.4%)	3 (0.6%)	468
23 (K-5)	697 (91.8%)	62 (8.2%)	759
31 (K-8)	828 (99.2%)	7 (0.8%)	835
Build (former 32) (PK-6)	575 (99.7%)	2 (0.3%)	577
35 (Special)	76 (96.2%)	3 (3.8%)	79
37 (PK-8)	809 (99.9%)	1 (0.1%)	810
39 (PK-6)	927 (100%)	0 (0%)	927
41 (PK-6)	371 (100%)	0 (0%)	371
47 (PK-6)	272 (100%)	0 (0%)	272
48 (PK-5)	396 (99.7%)	1 (0.3%)	397
50 (Special)	99 (100%)	0 (0%)	99
53 (PK-6)	880 (99.9%)	1 (0.1%)	881
59 (K-5)	566 (98.3%)	10 (1.7%)	576
62 (K-7)	712 (92.5%)	58 (7.5%)	770
74 (PK-6)	626 (98.9%)	7 (1.1%)	633
75 (PK-6)	363 (100%)	0 (0%)	363
90 (K-6)	512 (89.3%)	61 (10.7%)	573
93 (K-3)	99 (100%)	0 (0%)	99

SOURCE: PX6 at 13-20 (Statistics); DX 3 (Grades).

TABLE 4

ELEMENTARY SCHOOLS 80-100% MAJORITY ENROLLMENT (OCT. 1973)

School	*Minority*	*Majority*	*Total*
11 (K-8)	43 (9.8%)	398 (90.2%)	441
18 (K-6)	43 (9.8%)	395 (90.2%)	438
19 (K-8)	70 (11.8%)	523 (88.2%)	593
26 (K-6)	32 (7.9%)	374 (92.1%)	406
27 (K-6)	4 (0.6%)	631 (99.4%)	635
28 (K-6)	70 (11.8%)	522 (88.2%)	592
29 (K-8)	43 (6.0%)	690 (94%)	733
30 (K-6)	13 (6.8%)	177 (93.2%)	190
33 (PK-6)	45 (8.7%)	471 (91.3%)	516
34 (K-5)	38 (13.4%)	245 (86.6%)	283
38 (PK-8)	83 (13.0%)	554 (87.0%)	637
43 (K-8)	27 (2.8%)	920 (97.2%)	947
45 (K-8)	83 (8.9%)	848 (91.1%)	931
49 (K-5)	14 (7.2%)	179 (92.8%)	193
51 (K-6)	40 (9.3%)	388 (90.7%)	428
52 (K-8)	54 (7.8%)	637 (92.2%)	691
60 (K-6)	13 (2.1%)	620 (97.9%)	633
63 (K-8)	86 (15.5%)	469 (84.5%)	555
65 (K-6)	51 (13.4%)	330 (86.6%)	381
66 (K-8)	74 (10.6%)	621 (89.4%)	695
67 (K-8)	44 (6.6%)	626 (93.4%)	670
69 (K-8)	57 (10.6%)	479 (89.9%)	536
70 (K-6)	6 (1.4%)	427 (98.6%)	433
71 (K-6)	63 (18.4%)	279 (81.6%)	342
72 (K-8)	9 (1.1%)	821 (98.9%)	830
77 (PK-8)	114 (15.1%)	640 (84.9%)	754
79 (K-4)	38 (11.9%)	282 (88.1%)	320
80 (K-8)	53 (16.5%)	269 (83.5%)	322

School	*Minority*	*Majority*	*Total*
81 (K-8)	87 (12.8%)	595 (87.2%)	682
83 (K-5)	3 (2.3%)	127 (97.7%)	130
84 (Special)	40 (17.9%)	184 (82.1%)	224
86 (K-5)	26 (8.4%)	284 (91.6%)	310
88 (K-4)	4 (3.2%)	125 (96.8%)	129

SOURCE: PX6, at 13-20 (Statistics); DX3 (Grades).

TABLE 5

MIDDLE AND JUNIOR HIGH SCHOOLS
80-100% MINORITY-MAJORITY ENROLLMENT
(OCT. 1973)

School	*Minority*	*Majority*	*Total*
Fillmore Middle	690 (89.0%)	85 (11.0%)	775
Clinton Junior	846 (100%)	0 (0%)	846
Genesee Humboldt Junior	932 (90.9%)	93 (9.1%)	1025
Southside Junior	202 (15.4%)	1107 (84.6%)	1309
Woodlawn Junior	764 (99.6%)	3 (0.4%)	767

SOURCE: PX 6, at 21.

TABLE 6

ACADEMIC HIGH SCHOOLS
80-100% MINORITY-MAJORITY ENROLLMENT
(OCT. 1973)

School	*Minority*	*Majority*	*Total*
East High	1622 (99.0%)	17 (1.0%)	1639
Riverside High	232 (15.1%)	1301 (84.9%)	1533
South Park High	245 (12.7%)	1683 (87.3%)	1928

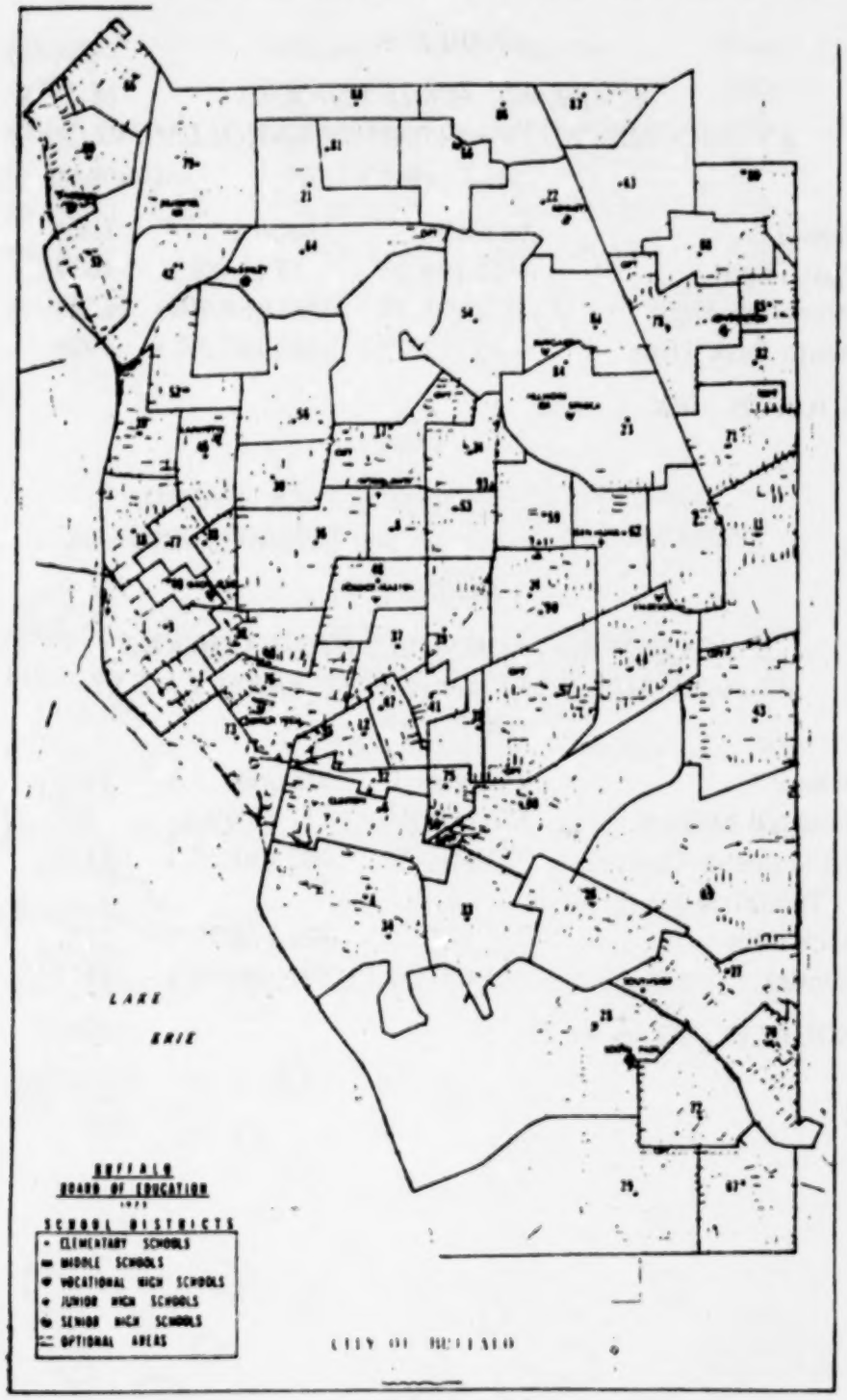
SOURCE: PX 6, at 22.

TABLE 7

VOCATIONAL-TECHNICAL HIGH SCHOOLS
80-100% MINORITY-MAJORITY ENROLLMENT
(OCT. 1973)

School	*Minority*	*Majority*	*Total*
Fosdick-Masten	576 (98.1%)	11 (1.9%)	587
Hutchinson-Central Technical	223 (19.8%)	902 (80.2%)	1125
McKinley	235 (20.3%)	922 (79.7%)	1157
Seneca	222 (20.0%)	891 (80.0%)	1113

SOURCE: PX 6, at 23.



MAP 1

The BPSS exhibits a complex combination of grade structures and feeder patterns. Elementary schools vary from pre-kindergarten or kindergarten through third, fourth, fifth, sixth, seventh, or eighth grades. Middle schools are fifth through eighth grades, junior high schools, seventh through ninth grades, and high schools ninth through twelfth grades. Depending on the grade structure of the individual elementary school, a child may remain in one grammar school for his complete elementary education, or progress to a second grammar school, a middle school, or a junior high school. For instance, Schools 16, 30 and 38 are all within a matter of blocks of each other on the city's near west side. A child attending School 16, a K-6 school, will proceed to Woodlawn Junior High School and then Grover Cleveland High School, while a child starting out at School 30, another K-6 school, will transfer to School 56 for seventh and eighth grades and then go to Lafayette High School, while a third child at School 38 will remain at that school from kindergarten through eighth grade and then to go Grover Cleveland High School.[19] (PX 296, at 26; Record, Vol. VIII, at 21-22).

As a general rule,[20] pupils do not have a choice of elementary schools. They must attend the school in the district[21] in which they live. This is also true for the junior high schools, the middle schools and the academic high schools. However, it is not true for the vocational-technical high schools, which accept students from all over the city and have no district lines.

[27] IV. THE TRIAL

For purposes of assessing the allegations of the plaintiffs, the court will analyze separately what it considers to be the major issues: East High School, the siting and districting of Woodlawn Junior High, the use of transfers, optional areas

and redistricting of attendance zones, the vocational-technical high schools, staff segregation, the state integration mandate, and the housing segregation in Buffalo.

[28] IV-A. *EAST HIGH SCHOOL*

There are seven academic high schools in the BPSS. Each of these schools has its own area from which it gets its students. The policy of the Board of Education has been, at least since 1956, that students living in a certain academic high school's district must attend that high school (S-42). Any deviation from the Board's attendance policy requires authorization from the Office of Pupil Personnel Services, and "may only be granted for hardship, language, and voluntary integration." (S-42).[22] The enrollments at the academic high schools as of January 1966 and October 1973 are shown in Table 8 below.

TABLE 8

ACADEMIC HIGH SCHOOL ENROLLMENTS
1966 and 1973

Schools	*Total Jan. 1966*	*Majority*	*Minority*
Bennett	2050	1494 (72.9%)	556 (27.1%)
East	1818	157 (8.6%)	1661 (91.4%)
Grover Cleveland	1453	1289 (88.7%)	164 (11.3%)
Kensington	1999	1959 (98%)	40 (2%)
Lafayette	1522	1257 (82.6%)	265 (17.4%)
Riverside	1830	1804 (98.6%)	26 (1.4%)
South Park	2649	2494 (94.1%)	155 (5.9%)

Schools	*Total Oct. 1973*	*Majority*	*Minority*
Bennett	1606	899 (56%)	707 (44%)
East	1639	17 (1%)	1622 (99%)
Grover Cleveland	1139	674 (59.2%)	465 (40.8%)
Kensington	1923	1093 (56.8%)	830 (43.2%)
Lafayette	1152	664 (57.6%)	488 (42.4%)
Riverside	1533	1301 (84.9%)	232 (15.1%)
South Park	1928	1683 (87.3%)	245 (12.7%)

SOURCE: PX 6. at 22.

Although the outer boundaries of the BPSS have remained static for many years, the individual high school district lines that govern attendance zones have been altered many times. East High School is among those schools that have been redistricted.

Plaintiffs charge that through redistricting and language transfers, the defendants have increased and maintained the racial segregation at East High School. In assessing the evidence, this court is cognizant that "[w]hat is or is not a segregated school will necessarily depend on the facts of each particular case." *Keyes, supra,* 413 U.S. at 196.

[30] 1. REDISTRICTING

The stipulations indicate the following facts with regard to the redistricting of East High School:

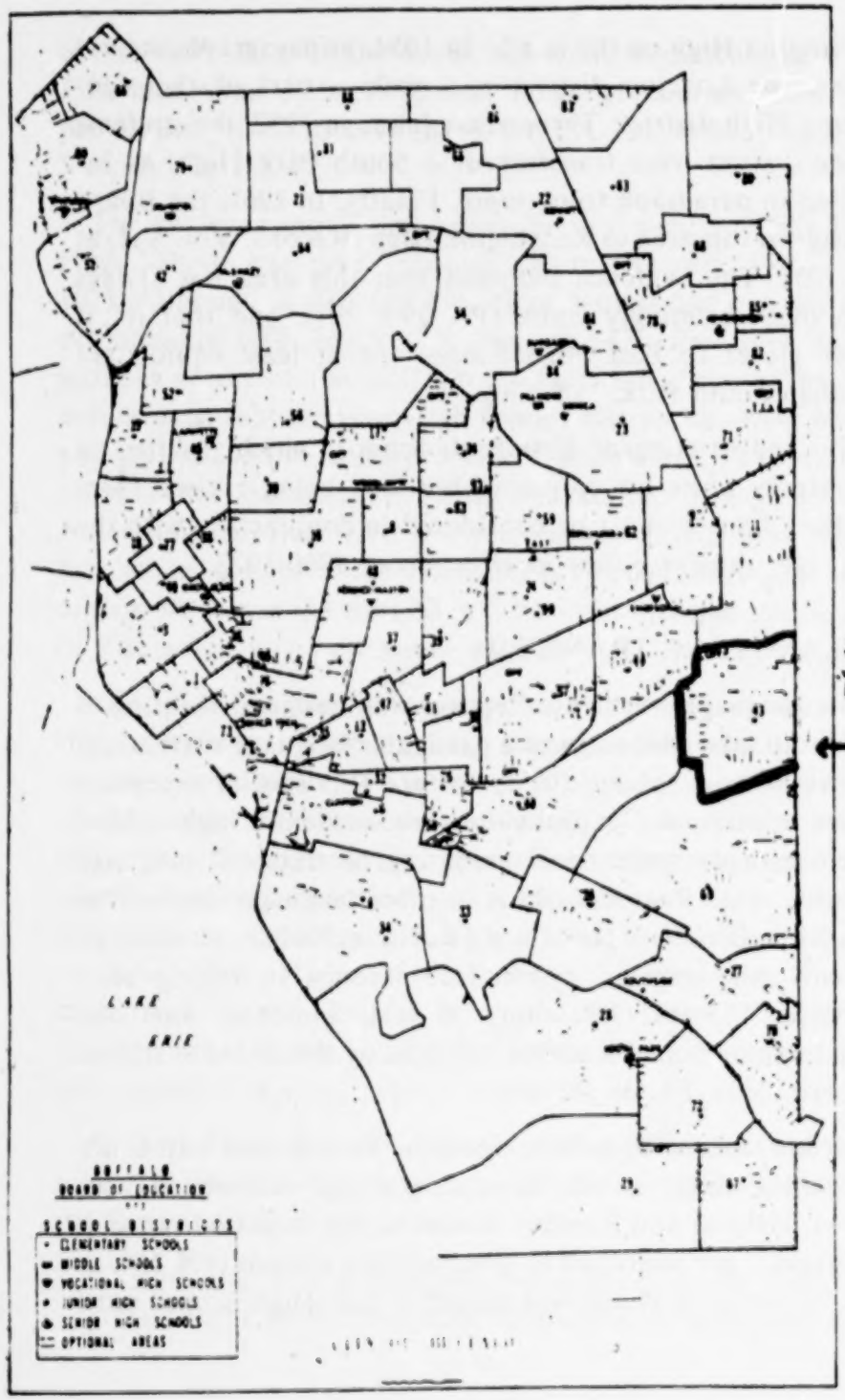
1. The Board in May 1954 adjusted the East district so that the students residing in an optional[23] area in the eastern sector of the district would thereafter not be given the option of attending East. The students in this optional area were "practically all white." (S-151).

2. Another district adjustment by the Board at this time extended the East district further south. The result of this was that some black students were required to go to East instead of the predominantly white South Park High School (S-152).

3. Three years later, in May of 1957, another redistricting for East was authorized by the Board. This changed an area[24] then optional to Grover Cleveland, Bennett and Lafayette High Schools to East's district. Most of the students in this formerly optional area are black (S-153).

4. At that same Board meeting, graduates of School 43 were assigned to South Park High School. School 43 students were predominantly white and the school was just as close to East as to South Park (S-154-156).

The redistricting testimony at trial was not extensive, but it did flesh out the bare bones of the stipulations. S-151 and 154-156, paragraphs one and four, *supra*, deal with the same area, commonly referred to as the "Lovejoy" or "School 43" area. *See* Map 2, *infra*. As of 1950, this section was part of the East High district. In July of 1951, it was declared an optional district, providing students residing in that area the choice of attending either East High on the west, or



Kensington High on the north. In 1954, as paragraph one explains, the Lovejoy district was made a part of the Kensington High district. Three years later, in 1957, the students in the district were transferred to South Park High, as indicated in paragraph four, *supra.* Finally, in 1961, the Board reassigned this area to Kensington High (Record. Vol. VII, at 103-105). The evidence indicates that this area has always been overwhelmingly white (PX 290; 291), and that it "is either closer to East High School—or at least equidistant to—than South Park." (S-156).

This redistricting of East High School, which resulted in the largely white Lovejoy neighborhood being excised from the East district, must be considered in conjunction with the language transfer policy in effect from 1960-1972.

[32] 2. LANGUAGE TRANSFERS

The language transfer exception was designed to allow a student to take advantage of a particular language curriculum that his district school did not offer. This special exception injects additional flexibility into an academic high school system already quite accommodating of students' language pursuits, since Board policy is to offer language courses "in each high school if there are [sic] a sufficient number of students who express a bonafide interest in taking such language." (S-46). Testimony at trial indicated that the minimum number of students required by the Board is fifteen (Record, Vol. III, at 195-96).

Certain languages, such as Spanish, French and Latin, are apparently taught at all the academic high schools. Polish, Italian, Hebrew and Russian, however, the so-called "special languages," are restricted to selected high schools (PX 264, at 545). A course in Polish was taught at East High School until

about 1960, but, of the seven academic high schools, only East had none of these special language courses from approximately 1960 to 1972 (S-53, 54; PX 264, at 545; Record, Vol. IV, at 75).

The evidence shows that sometime in the early 1950's East High School was predominantly white (Record, Vol. I, at 102). Although in 1970 the East High district had become approximately 60% black (PX 264, at 547), the court takes judicial notice of the well known fact, not disputed by the defendants, that the East High School district had long been, and still was in the 1950's and 1960's, populated by substantial numbers of persons of Polish extraction. Many Polish-Americans still live there. If there was any district in the Buffalo school system where a demand for Polish language classes existed, it was the East High School district and the Board of Education was well aware of this.[25]

It is not only a clearly foreseeable and natural consequence that curtailment of the language classes at East would induce transfers to other high schools, it is obvious that this result would occur. The evidence produced at trial corroborated this. Plaintiffs proved that many East district students obtained language transfers to study one of these special languages at another public high school, usually South Park or Kensington Highs. All of these transfers had to be authorized by the Student Personnel Services Office. They caused annual headaches for that office, which was inundated with transfer requests prior to the start of each school year.

As the following testimony of the head of the Student Personnel Services indicates, this situation was made known to the Superintendent of Schools.

> Q. Did you at anytime recommend to the Superintendent or to the Board of Education or to anyone that

the languages that these students were asking to take be offered at East High School?

A. Yes, I did. In fact, we constantly did . . . . . So constantly we brought to the Superintendent's attention maybe these languages should all be put into East High School.

Q. When would you recall that you first made that recommendation?

A. Probably every year. Probably every year.

Q. Every year. Would that be every year from 1965 when you assumed your position?

A. Probably. Probably, yes.

(Record, Vol. III, at 201-202).

The language transfers out of East were called to the Board's and to the Superintendent's attention by others also. At a Board meeting on May 26, 1971, Superintendent Manch was specifically informed that South Park High School alone had 143 out of district students, "generally from the East High School district," studying Polish and Russian (PX 60, at 88-89). The possibility that language transfers were contributing to East's predominantly black enrollment was raised as early as 1963 in a report by the Civil Rights Commission of the United States (PX 10, at 18). Noting that East High at that time was predominantly black, though the East district was not, the report suggested that language transfers were possibly being used by white students to transfer out of East.

The report pointed out the curious result of a 1957 adjustment in the Riverside High-Bennett High boundary. The area assigned to Riverside, previously optional between Riverside and Bennett, contained a substantial Jewish population. Shortly after this change was made, the Board of Education became aware that significant numbers of the new Riverside High students were transferring back to Bennett to take

Hebrew. To avoid this, the Board instituted Hebrew classes at Riverside High School (PX 10, at 17-18). The Board could have instituted the same policy with regard to East and the Polish language classes to avoid the transfers out of East High. That they did not is an indication that they did not want to.

The difficulty that the Board's transfer policy caused only served to highlight the Board's attitude. When dealing with a system of seven academic high schools, it is inevitable that an action taken regarding one school's attendance policies will have a reaction on other schools. The language transfers out of East High for Polish and Russian contributed substantially to severe overcrowding at South Park High, and the Board was aware of this (PX 60, at 64-67; 88-89). A past president of the Board, Mr. Arnold Gardner, testified that

> from time to time this [language transfers] arose at the Board. I would say it arose and received brief attention on only a few occasions. It was one of those items with which we are all familiar. It was one of those items that people mention and drop because they are embarrassed by it and from time to time it would be proposed that Polish be offered at East High School and there would be a series of knowing smiles around the table and after a moment's discussion, that would be abandoned.
> (Record, Vol. I, at 147).

It cannot be disputed that East is now, and has been at least since 1960, an identifiably black school.[26] The Board attempts to rebut the plaintiffs' allegations that the Board caused East to become predominantly black by showing that the residential tracts surrounding East have become progressively more black as the years have passed.[27] While it is certainly true that the East district population has exhibited a substantial shift

from predominantly white to predominantly black, nonetheless, even in 1973 the minority district percentage was only about 60%, while East High was 99% minority—and had been over 90% minority for at least eight years. *See* Table 8, *supra.* It is obvious to the court that more than mere demographics caused this drastic effect. In 1966 East was already *the* black academic high school, with a student body 91.4% minority. By comparison at that time, Bennett stood at 73% majority, Lafayette at 83% majority, Grover at 89% majority, and Kensington, Riverside and South Park High Schools all over 90% majority. *Id.* Almost three out of every five black academic high school students in 1966 attended East High (PX 6, at 5).[28]

The Board admits that the language transfer policy contributed, in some degree, to East's racial imbalance. Furthermore, the head of the Student Personnel Services admitted, both on redirect and recross examination, that he believed that in many cases the language transfers were used to avoid attending East High School (Record, Vol. VIII, at 101, 105). He also testified that there was no procedure whereby the central school administration monitored the transferring students to check whether or not they actually attended the requested language courses (Record, Vol. VIII, at 90-91).

However, the Board denies that its language transfer policy was a substantial causative factor of East High's imbalance. The first hand statistics on the racial effect of transfers were not available until 1966. The following table shows the numbers of transfers, including language transfers, granted at East since that year.

TABLE 9

TRANSFERS FROM EAST HIGH

Year	*Total Enrollment*	*Majority Enrollment*	*Transfers Granted*	*Minority Enrollment*	*Transfers Granted*
1966	1818	180 (9.9%)	73	1638 (90.1%)	39
1967	1814	112 (6.2%)	109	1702 (93.8%)	74
1968	1599	42 (2.7%)	129	1557 (97.3%)	91
1969	1696	27 (1.6%)	87	1669 (98.4%)	112
1970	1710	24 (1.4%)	176	1686 (98.6%)	114
1971	1343	2 (.2%)	51	1341 (99.8%)	102
1972	1393	23 (1.7%)	9	1370 (98.3%)	7
1973	1638	23 (1.4%)	2	1615 (98.6%)	6

SOURCE: DX 8.

The City defendants argue:

> [H]ow can such a racially imbalanced school, 90.1% black, in 1966, have been substantially affected by a policy that had no known racial impact on said school until some two years later?
> Post-trial Brief for City Defendants, at 22.

The court finds this logic difficult to follow. Merely because cold raw data on the racial effect of transfers was unavailable prior to 1966 does not mean that this racial effect was not discernible prior to this date. The Board was aware that language transfers could produce this effect, as shown by the Riverside-Bennett experience; it was warned that it was producing this effect in 1963; and it was obviously cognizant that East High's district contained many Polish speaking families. East was the only high school that offered no foreign languages from 1960 to 1972.

A brief examination of Table 9, *supra*, indicates that the segregative effect of transfers out of East, including language transfers, was substantial during those years, and from all the evidence the court can infer that it was substantial prior to those years. In 1967, as Table 9 shows, 112 majority students attended East while almost as many, 109, transferred. In 1968, only 42 white students attended while 129 transferred. In 1969, 27 attended and 87 transferred; and in 1970, 24 attended while 176 transferred. Although Table 9, *supra*, does not indicate the percentage of transfers granted for language study, it was admitted that as of October 19. , 197 white students from East High's district were studying languages at South Park. (S-56).

In addition to what these stark numbers show in terms of an annual effect, there is a certain cumulative impact to consider, since each student who transfers can remain at the transferee school for the duration of his high school career. That there were no definite statistics available prior to 1966 does not prohibit this court from concluding, in light of all the circumstantial evidence, that the language transfer device produced a substantial adverse racial impact on East High School before 1966.

On July 6, 1972 the Board ordered that a full range of foreign languages be offered at East High, and that no more language transfers out of East be permitted. (S-58). At trial, the Board of Education introduced evidence tending to show that in 1972-73, the first school year that language transfers were ended, most of the white students who should have attended East High School did not.[29] Since these East district residents could not avoid East through the language transfer device, the Board suggests that other subterfuges, such as false addresses, were apparently devised to thwart the Board's attendance policy. The essence of the Board's defense

is that nothing the Board of Education or the City could do would force white students to attend East High School.[30]

It is no excuse for the Board to say that whites shunned the school in 1972 after the Board had aided, abetted and helped to cause the attitudes that prompted this "white flight" from East High. Neither the Board of Education nor the City Council, nor even the Commissioner of Education can in candor deny that they had knowledge that East was becoming identifiably black throughout the late 1950's and early 1960's. The possibility that language transfer out of East was leading to East's racial imbalance was raised as early as 1962, and this problem was repeatedly called to the attention of the Board and the Superintendent of Schools. For the Board to argue that when it ended the language transfers in 1972, no effect on the racial imbalance at East High School resulted, puts its good faith in question. The language transfers encouraged the concentration of minorities in one out of the seven academic high schools.

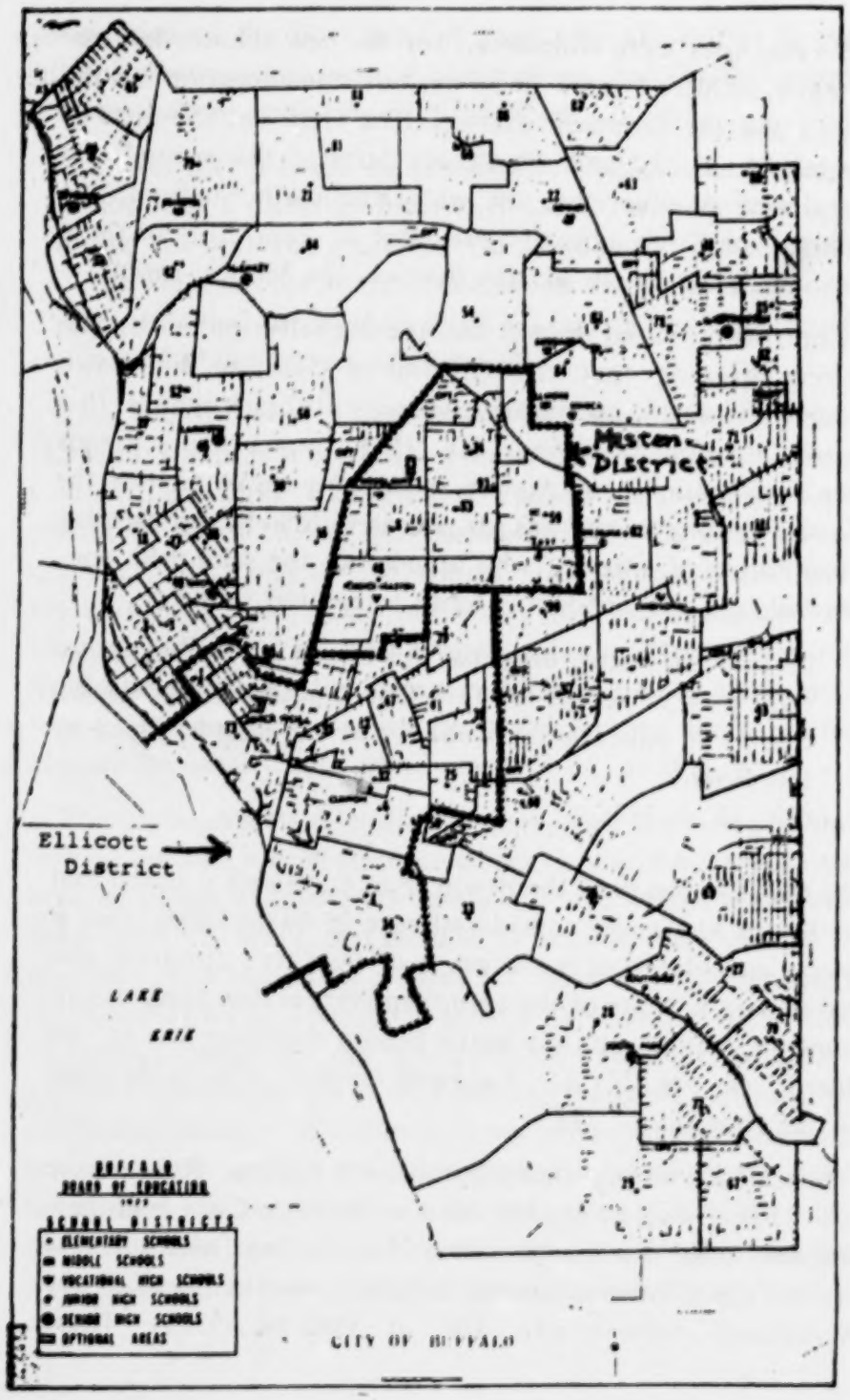
Finally, the Board argues that the stipulations which the Board agreed to and the evidence regarding the redistricting of East are so lacking in detail that they are void of evidentiary value, and that any increase in the minority population at East at the time of the redistricting could only have served to integrate that school. Even assuming that the Board is correct on the redistricting evidence, the deletion of special languages from the East curriculum in 1960 and the subsequent language transfers effectively nullified whatever integration had been achieved.

The racial impact of the language program was clearly foreseeable. In addition, and more important, the failure of the Board to amend this policy when it was obviously aware of its segregative impact is indicative that the Board intended that that segregative effect continue.

[46] IV-B. *WOODLAWN JUNIOR HIGH SCHOOL*

The siting and districting of Woodlawn Junior High School, hotly debated issues for nearly two decades, are alleged by plaintiffs as clear examples of purposeful racial segregation. The City defendants argue that economic and demographic considerations required the North Masten District site on Woodlawn Avenue, and that the racial makeup of the school was the inevitable result of residential patterns beyond their control. It is uncontested that the school has been nearly all black throughout its twelve-year existence. [S-24(b)].

The Masten District experienced a great influx of population during the 1950's, due in substantial part to the Ellicott District Redevelopment which resulted in the relocation of many black families in the Masten District. As a consequence, severe overcrowding of the public elementary schools in that area of the city occurred. (PX 34, at 28-29; PX 124, at 36).[31] Consistent with a previously devised master plan for junior high schools, the decision was made to construct a junior high to alleviate the situation. (PX 32, at 537-8).



Several sites were considered for the new school, but apparently only two were given serious consideration by the Board and the Common Council. The first was the area of Northland, Purdy and Alexander Streets; the second, on Woodlawn Avenue, was the old Offermann Stadium, the home of the City's minor league baseball team. Both of these sites are in the North Masten district. *See* Map 3, *supra*.

Controversy raged in 1958 over the site selection, with some citizens arguing that the Offermann Stadium-Woodlawn Avenue site would inevitable lead to an all black school. In a Board meeting December 10, 1958, concerned citizens presented their views. Among those who spoke against the Woodlawn Avenue site was Mr. Frank Caldwell, representing a committee of citizens, who urged that the school be constructed in a site conducive to an integrated facility:

> [W]e do staunchly urge that this Board . . . commence right now to accept the fact that residential segregation creates an educational problem, which must be faced by this Board.
> (PX 32, at 537).

The then Chairman of the Board, Paschal Rubino, stated that the Board had never considered race in its decisions, that it always considered only the needs of the City's children, and that "frankly, some of the apprehensiveness that exists at this point by your group, has neven been a consideration of this Board." (*Id.*, at 537). Mr. Caldwell replied: "That is the basis of our complaint." (*Id.*)

In addition to Superintendent Manch and Mr. Rubino, the late Councilwoman for the Masten District, Cora Maloney, and two local ward supervisors, Mr. Delmar Mitchell and Mr. F. Cecil Brown, among others, spoke in favor of the Woodlawn Avenue site. (*Id.* at 5383-84, 5393). These

proponents of the Woodlawn Avenue site, all leaders in the black community, expressed reservations, but finally agreed for the reasons stated by Mrs. Maloney:

> I wish that it could be at a different place, but if it can not be at a different place than the Offermann Stadium, and the children must have education, and the children are the innocent victims because the adults have situated and located there, then I rise or fall by the children of the Masten District. (*Id.* at 5371-2).

The Board voted unanimously to recommend the Offermann Stadium-Woodlawn Avenue site, and the Common Council, on Mrs. Maloney's resolution, unanimously approved it. Chief among the reasons cited by the Board were demographic changes—"[W]e must build schools where there are children. There is no other way you can approach it," (Rubino, *Id.*, at 5374), and economic forces—fewer families would be displaced; lost property taxes would be much less; time of construction would be considerably shorter; site acquisition costs would be lower. (PX 34, at 29).

There was evidence tending to show that this siting of the new junior high school guaranteed that it would be segregated because potential feeder schools mentioned at that time were predominantly black. But influential black leaders, like Mrs. Maloney, and Mr. Mitchell and Mr. Brown, who supported the Woodlawn site, apparently were convinced that regardless of the difficulties the site presented, the possibility of an integrated school was not foreclosed. As the court's discussion of the districting of Woodlawn shows, *infra*, the statements of Board members and the Superintendent encouraged their belief that the school would be integrated. They also apparently considered that economic and demographic reasons were sufficiently compelling to accept the Woodlawn Avenue site.

Although it is a close question, it is the court's opinion that this conflicting evidence is not sufficient to show racially segregative intent on the part of the City or the State defendants with respect to the siting of the Woodlawn Junior High School. As the court weighs the evidence, the siting of the school on Woodlawn Avenue was not a virtual guarantee of segregation, and it cannot be said "that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation." *Oliver v. Michigan State Board of Education, supra*, 508 F.2d, at 182.

However, the same conclusion cannot be reached with regard to the districting decision that was made six years after the siting. During the debate on the site selection for Woodlawn, the following statements were made concerning the possible configuration of the school's attendance zone:

MR. RAND, a Board member:

> Now, that particular site [Woodlawn Avenue site] is nearer to the center of that area, which I think is made up of not just one race or one group—it's quite an all embracing area, particularly the area stretching on the other side of Main Street,[32] so that is another matter.
> (PX 32, at 5375).

SUPERINTENDENT MANCH:

> Now, it is not unlikely—let me say it in that way, it is not unlikely that by placing the school in the Offermann site [Woodlawn Avenue], rather than the original site proposed, we may have a more integrated situation than would have been possible with the other arrangement, simply because the school is now suggested in a place a little bit further west—practically at Main Street, you might say. (*Id.*, at 5378).

> [W]e have no intention of being part of any movement to create a so-called segregated school, and that we would be conscious of this and do everything possible to make it a school which would be as integrated as the schools in that particular area can be. (*Id.*, at 5379).

The Civil Rights Commission Report in 1963 stated:

> Dr. Manch holds out hope that Woodlawn Junior High School will be an integrated school. "The zone will cross Main Street if I have anything to say about it," he declares.
> (PX 10, at 41).[33]

In a June 1962 letter,[34] Superintendent Manch had stated:

> A careful study precedes any establishment of new school districts or redistricting of school boundaries to be certain that the best possible pattern of integration may be effected despite the difficult problems which may be posed by housing.
> (PX 10, at 74).

Six years after the siting decision, push came to shove, as it were. After years of theorizing and analyzing, a final decision on the new school's attendance zone had to be made. The Board provided the forum for citizens to express their opinions, and heated public discussion occurred. Several districting proposals were bandied about by various Board members, the effects of which were racial ratios ranging from almost exclusively black to a 64-36 white majority (Record, Vol. III, at 174). In addition, an alternative plan was proposed by which Lafayette High School would be utilized for the new junior high, and the new facility on Woodlawn would be used as a high school [S-26(c); PX 34, at 1].

Board consideration of the districting question stretched over several meetings. Among the topics discussed at those meetings was the fact that between the date of the site selection in 1958 and the Board discussion of districting in 1964, the State Board of Regents had announced its policy on integration in the public schools of New York State (PX 28, pt. II, at 11-12).

At a Board meeting February 26, 1964, Superintendent Manch read to the Board a statement that then Commissioner of Education James Allen had made October 28, 1963:

> As a matter of policy, the State Education Department believes de facto segregation to be a detriment to the provision of equal educational opportunity. The Department further fervantly [sic] hopes that local authorities will deal with the elimination of de facto segregation, that the responsibility will be accepted at the local level. . . . Therefore, if appropriate local action is not forthcoming, if adequate plans are not made and actively pursued by local authorities, the state, in faithfulness to its responsibility, will have no choice but to act to move to fill the vacuum created by inertia or postponement in the exercise of local responsibility.
> (PX 122, at 22-23).

One month later, referring to the Commissioner's statement, Dr. Manch told the Board members:

> At no time did he [Commissioner Allen] term these statements "mandates" but they were interpreted as such throughout the state. Indicative of this, most of the large cities have already taken positions and acted on various proposals.
> (PX 124, at 36).

At the Board meeting on the 26th of March, 1964, Mr. Parlato, a Board member, submitted a written resolution that would district Woodlawn Junior High School with the result that the school would be 99% black [PX 34; PX 124, at 31-47; S-24(b)]. Board members Wright and Nitkowski had not been informed of this resolution prior to the meeting; Dr. Manch heard about it accidentally a day previous to its submission (Record, Vol. III, at 176; PX 34, at 26; PX 124, at 31). During discussion on the proposal, Dr. Manch advised the Board:

> [I]t is not now feasible, from the point of view of sound education and administration, in view of everything that has happened, in view of all the factors, it is not now feasible, I believe, to draw the district lines for Woodlawn in such a way as to achieve a racial balance that would be meaningful or stable. I don't think there is any middle ground in it any more.
> (PX 124, at 36).

Dr. Manch did not set out the specifics of why it was not feasible to avoid a totally segregated school. Among the factors he evidently was referring to when he stated "in view of everything that has happened," was a petition with ten thousand signatures submitted to the Board in 1963, by white parents living west of the Woodlawn school site, protesting the possible inclusion of their area in the Woodlawn district [PX 264, at 646; S-26(b)(ii)], and the atmosphere of the weeks previous to March 26, which he had referred to as "akin to panic." (PX 124, at 33).

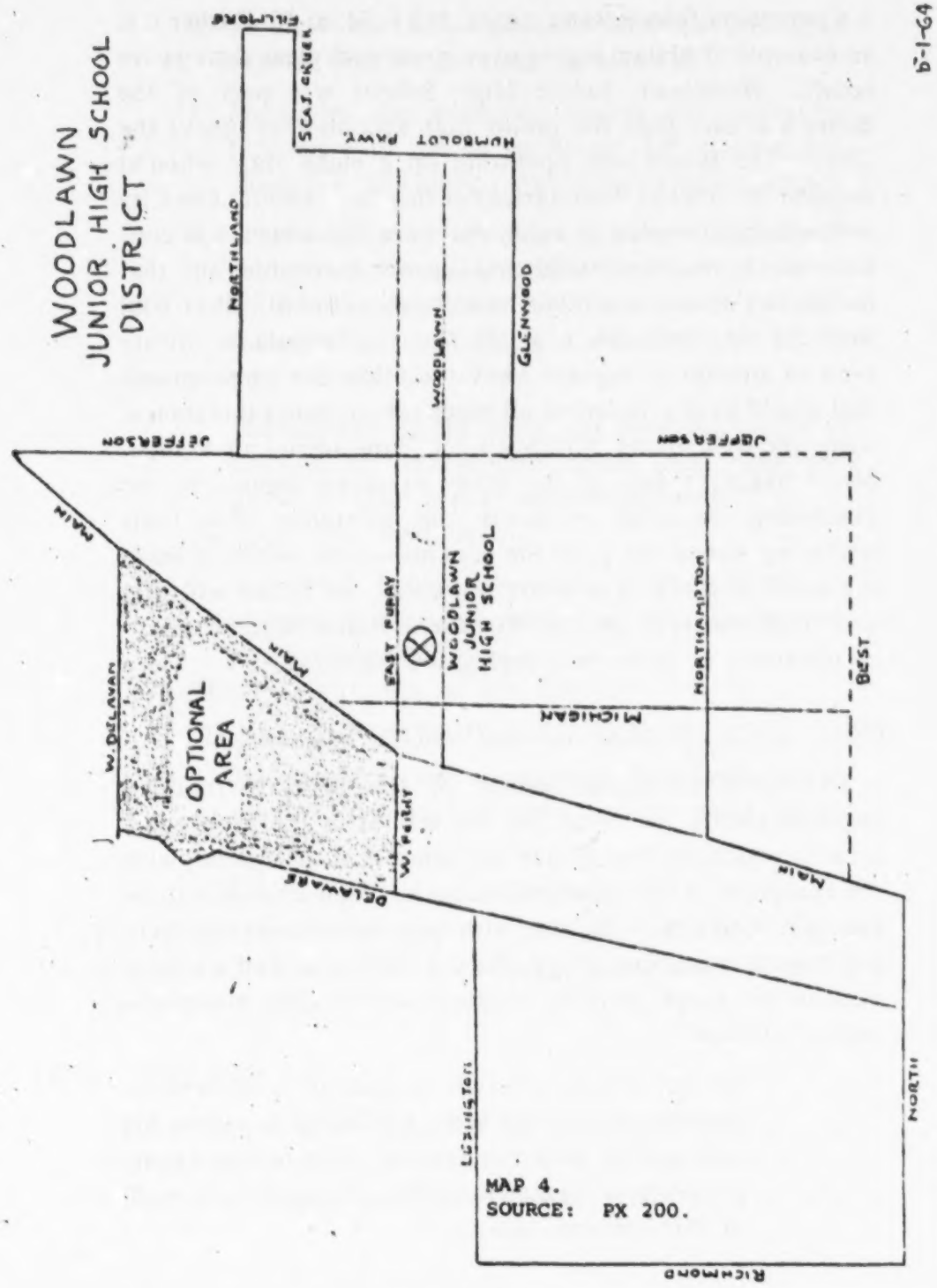
The Board voted in favor of the Parlato districting scheme six to one. (PX 124, at 47). The sole dissenting vote was cast by Dr. Lydia Wright, the only black Board member, who had proposed both a districting scheme that would have avoided a

segregated school and who also had supported the alternative plan involving switching Lafayette High School and the new junior high school.

The final district plan for Woodlawn Junior High did extend west of Main Street, thus encompassing predominantly white neighborhoods, but a considerable portion of the district west of Main was made an optional zone, allowing students residing there the choice of attending School 56 or Woodlawn Junior. [S-27(b)(3)]. *See* discussion of optional areas, Section IV-C(2), *infra*. The remaining portion of the Woodlawn district west of Main was not made optional, but the evidence showed that many students residing in this area (*see* Map 4, *infra*) avoided Woodlawn Junior by transferring to predominantly white schools. *See* discussion of transfers, Section IV-C(1), *infra*. The racial composition of Woodlawn Junior High School has not changed measurably in the twelve years since that vote.[35]

The evidence is overwhelming that the action of the Board, in approving the Parlato districting plan for Woodlawn Junior High, was done with full understanding that the result would be a school student body almost totally black, and that this was the desire of the Board.

This is not a case of "mere inaction . . . allowing a racially imbalanced school to continue." *Hart*



MAP 4.
SOURCE: PX 200.

v. Community School Board, supra, 512 F.2d, at 48. Rather it is an example of blatant segregative intent with clear segregative results. Woodlawn Junior High School was part of the Board's master plan for junior high schools throughout the City.[36] The Board was operating on a clean slate when it decided the district boundaries for this new school. The City defendants attempted to argue that once Woodlawn was constructed the resultant racial makeup was inevitable, and that the district chosen was "tight" and "well defined." (Post-trial Brief for City Defendants, at 28). Yet, the defendants' failure even to attempt to explain away the other zoning proposals that would have avoided an all black school belies this stance. Also, the defendants' failure to call Superintendent Manch, Mr. Parlato or any of the other principal figures to the districting decision, supports the inference that their testimony would not alter the conclusion the evidence leads the court to make. The court finds that the Board willfully and intentionally caused the Woodlawn Junior High School to be districted so as to be a segregated school.

[58] IV-C. *TRANSFERS AND OPTIONAL AREAS*

The basic attendance policy of the BPSS is rigid--it requires each pupil to attend the school in the geographic zone in which he lives (S-42). All schools in the system, with the exception of the vocational-technical high schools, follow this rule (S-95). As is the case with most rules, however, there are several exceptions which allow a child to attend a school outside his geographically assigned school. The major exceptions follow.

1. Special course offered—a student is allowed to transfer to another school offering a course his own school does not feature. This is best exemplified by language transfers. *See* section IV-A(2) of this opinion, *supra.*

2. Medical necessity—physical and psychological reasons may be grounds for transfer.
3. Hardship—this exception makes allowances for families with special problems that make it difficult for the child to attend his ordinary school.
4. School adjustment—this exception apparently ecompasses transfers to a different school when a child, for one reason or another, has had difficulty with teachers or other students in his original school.
5. Harassment—if the child has been the victim of physical or psychological abuse from other students, a transfer is sometimes allowed.

(Record, Vol. VIII, at 27).

6. Voluntary integration—inner city students are allowed to attend peripheral schools outside their normal attendance zone.

(Record, Vol. VII, at 108-109).

7. Optional areas—students residing in certain geographical areas are granted the privilege of attending a school outside their normal school district.

(S-34).

The plaintiffs charge that the Board defendants have manipulated the transfer rules and optional areas to effect segregative results.

[59] 1. TRANSFERS

Plaintiffs put into evidence over 70 transfer requests that were granted in the years 1968-1973 (PX 51; Record, Vol. IV, at 23-46). Among the specific reasons for granting the transfer

requests, as stated by school officials on the transfer forms, were fear of black children and avoidance of Woodlawn Junior High School. On many of the forms, no reason at all is stated for granting the requested transfer. Although not all of these transfers adversely affected the racial balances of the schools involved, many involved transfers out of predominantly black schools to predominantly white schools (S-50, 51, 52, 60). It was also stipulated by the parties that, in addition to official transfers granted by the Office of Pupil Personnel Services, some principals of schools peripheral to predominantly black schools granted unofficial transfers (S-49).

Because of the different feeder patterns and grade structures, such transfers have potentially double and triple segregative ramifications. For example, School 16 students feed into Woodlawn Junior High School. On the other hand, students attending School 30, a few blocks away, feed into School 56 for grades seven and eight, and then go to Lafayette High School (PX 296, at 26). So, a student avoiding black School 16 by transferring to School 30 is able to also avoid the nearly all black Woodlawn Junior High. Board officials were aware that the avoidance of Woodlawn Junior High prompted some transfers (Record, Vol. IV, at 12-13).

Table 10 shows the racial makeup of three elementary schools located on Buffalo's near West Side. All three of these schools are within blocks of each other, and none is in a predominantly black residential area.

TABLE 10

School 16	*Minority*	*Majority*	*Total*
1962	149 (61%)	94 (39%)	243
1968	332 (91%)	33 (9%)	365
1973	178 (90%)	19 (10%)	197
School 30			
1962	0 (0%)	189 (100%)	189
1968	23 (9.4%)	222 (90.6%)	245
1973	13 (6.8%)	177 (93.2%)	190
School 38			
1962	12 (2.5%)	463 (97.5%)	475
1968	55 (8.2%)	616 (91.9%)	671
1973	83 (13%)	554 (87%)	637

SOURCES: 1962 figures from PX 10, at 52-53;
1968 figures from DX 6, at 2, 4, 6;
1973 figures from PX 6, at 13-15.

School 16's district extends one block east of Main Street, into a predominantly black area, but it also extends seven blocks west of Main Street, a predominantly white area. (Record, Vol. I, at 162; PX 1). Although School 16's district is predominantly white, the school, at least for the last decade, has been predominantly black, a situation one witness described as "anomalous." (Record, Vol. I, at 164). It is stipulated that in 1972 twenty-seven students from the School 16 district were attending School 30, and fifteen from School 16's district were attending School 38. (S-51, 52).

Table 11 reflects the following facts about Schools 4 and 34: School 4 is heavily minority, School 34 is even more heavily majority, and the imbalances at both schools have become more disparate since 1962.

TABLE 11

School 4	*Minority*	*Majority*	*Total*
1962	339 (47.3%)	374 (52.7%)	713
1968	516 (78.2%)	144 (21.8%)	660
1973	545 (73.2%)	199 (26.8%)	744
School 34			
1962	43 (15.6%)	232 (84.4%)	275
1968	30 (11.3%)	235 (88.7%)	265
1973	38 (13.4%)	245 (86.6%)	283

SOURCES: PX 10, at 52-53; DX 6, at 1, 5; PX 6, at 13, 15.

What the table does not show is that these two schools are in one school district, that they are a few blocks from one another, that they have the same principal, that the Board considers School 34 to be an annex to School 4, that School 34 was built in 1863, and that School 4 is so under utilized that all the students in School 34 could easily be accommodated there. (PX 47, at 2; Record, Vol. III, at 23, 25, 26, 103; PX 263, at 63).

Defendants argue that this is not a case of segregative action by the Board because the two schools are separated by a railroad track and the student population at both schools very nearly mirrors the populations of the respective neighborhoods the schools serve (Record, Vol. III, at 103, 106, 109-110). The flaw in the defendants' logic is that this argument fails to take into account that in 1970-1971, for example, 38 minority students from School 34's area were attending School 4, and 41 white students from School 4's area were attending School 34 (Record, Vol. III, at 24). According to the HEW review, the principal of the schools cited three reasons for these transfers: suspensions (an unknown number), special classes (the number is negligible), and favors granted to parents by a former principal (PX 264, at 586). At one time, the Board did attempt to shut down the antiquated School 34 and consolidate the schools, but area residents protested and the Board demurred (PX 264, at 586). It is, of course, no constitutional violation for the Board to ignore its own sound economic or educational determination and continue to operate a rundown facility. But the Board cannot maintain a segregated facility in order to placate the local community. *Spangler v. Pasadena City Board of Education*, 311 F.Supp. 501, 523 (C.D. Calif. 1970).

Defendants attempt to rebut the transfer evidence presented by the plaintiffs by showing that the transfer policies predate problems of racial imbalance and were instituted without any racial motives, and that in any case any segregative effects from the transfers granted were not substantial. The defendants' contentions completely miss the mark. There is no allegation that the transfer policies *per se* are denying plaintiffs their rights. Any organization must have flexibility, and a school system of 90 schools and over 60,000 students must, of course, allow for special circumstances. Valid transfers are not attacked. What is attacked is the knowing granting of transfers, for specious or blatantly discriminatory reasons, that increases the segregation that characterizes many schools in Buffalo. The defendants cannot deny what their own records show and what their own Director of Student Personnel admits—transfers were granted white students to avoid attending predominantly black schools.

The transfer policy not only increased segregation, which when isolated as separate transfers might appear insubstantial, but it also increased the proliferating tendency on the part of both school administrators and the public at large

to identify certain schools as black. It is one thing to argue that unauthorized and surreptitious transfers, granted by certain principals, cannot be said to have substantially harmed the plaintiffs. It is quite a different matter when the individuals officially responsible for such matters authorize such transfers. Like a clever photographer who uses an airbrush to eliminate what he does not want in a picture, the defendants try to haze over what the evidence clearly shows. But we are not dealing with art here, and the Constitution does not permit this court to avoid the evidence, however unsightly.

The combined effect of official and unofficial transfers, including the language transfers detailed in the court's discussion of East High School, *supra,* was an annual total of 2,000-4,000 white students attending schools outside the zone in which they live,

> thereby contributing to the higher percentage of black students in various schools, including Schools 54, 16, Fillmore Middle, Genesee-Humboldt [Junior High], Woodlawn [Junior], East High School, all of which have black student populations of at least sixty percent. (S-60).

[68] 2. OPTIONAL AREAS

The stipulated materials show that optional areas, which allow students to attend a school outside of their normal attendance zone, existed in the following school districts:

1. An area involving Schools 56, 30, 16 and 17. Schools 56 and 30 are heavily white, while Schools 16 and 17 are predominantly black. The optional area, located in School 17's district, allowed students living in that area to avoid School 17 in favor of one of the other three schools [S-35(a)].

2. An area involving Schools 54, 74 and 17. School 54 was a majority white school until recent years. This optional area, also located in School 17's district, allowed students to avoid 17 by attending 54 or 74 [S-35(a)].

3. An area involving Schools 31 and 40. Students in the overwhelmingly white optional area, located in School 31's district, could attend 40, a white school, in favor of School 31, a predominantly black school. This option ended in 1965 when the area was put in the School 57 district. School 57 at that time was a predominantly white school [S-35(b)].

4. An area involving Schools 40 and 75. Students in this area, in the School 40 zone, could attend either 40, majority white, or 75, almost totally black [S-35(c)].

5. A portion of the Woodlawn Junior High School district, comprising the area bounded by Delaware Avenue, Main, West Ferry and West Delavan Streets, was made optional in 1964 when the school was originally districted. Students residing in that predominantly white area could attend either School 56 (which feeds into Lafayette High School) or Schools 16 or 17 (which feed into Woodlawn Junior High School) [S-35(d); S-27(b)(3)].

6. All district boundary streets were optional zones, allowing residents of those streets the options of attending either of the contiguous district schools [S-35(f)].

It is not denied that these optional zones enabled some white students living in these zones to avoid the schools they would normally attend in favor of predominantly white schools (S-38). Nor is it denied that the City defendants were fully cognizant of the detrimental racial result of these options long before this policy was abrogated (S-36, 40; *see* PX 10, at 23-27). The parties have agreed that

> [m]aintenance of the optional areas has contributed to racial separation and isolation in the Buffalo public school system.
> (S-41).

Any student, whether black or white, who resided in an optional district could take advantage of the option. The evidence showed, however, that the populations of the optional areas were usually predominantly white (Record, Vol. III, at 70).

A vivid example of the egregious segregative effect these optional areas could produce is School 17. This school is located just west of Main Street, with its district lines encompassing an area to the east and to the west of Main. In 1962, according to the United States Civil Rights Commission Report, the eastern section of School 17's attendance zone was approximately 80% black, the segment on the west about 95% white, yet even at that time School 17's enrollment was 98% black (PX 10, at 14). The optional area, consisting of the western, or white, portion of 17's district, provided a convenient alternative for white students. School 17 remains nearly all black today. *See* Table 3, *supra.*

Did the School Board intend this segregative result? We must conclude that it did. If the Board was not fully aware of the problems caused by optional areas, and School 17's optional in particular, before the anomalous racial balance of

School 17 was cited in the United States Civil Rights Commission Report in 1953 (PX 10, at 14), it was certainly aware of it after the Report was published. The report noted that "the continued existence of the option [area] was thought to be an example of the school authorities' unwillingness to recognize the segregative effect of their policies." (*Id.*, at 14). Most of these optional areas remained in existence for another decade, and each year students living in an optional zone were allowed to exercise their option with harmful results to the racial balance of the schools involved. The segregative results of the optional areas policy were, under the *Hart* test, clearly foreseeable. *Hart, supra,* 512 F.2d, at 50.

The defendants' witness, Mr. Leonard Testa, an employee of the Board of Education, testified that high school optional districts were designed to make the system more flexible in the face of population shifts, but these high school optionals were abolished in 1957 (Record, Vol. VII, at 101-102). No rational reason for the remaining optional areas, involving grammar schools and Woodlawn Junior High, was advanced by the defendants.[37] The 1963 Civil Rights Commission Report ascribed their origin to "tradition". With regard to the failure of the Board to end the optionals, the report noted:

> Tradition and inertia are powerful forces in our society. They seem a weak excuse, however, for inaction.
> (PX 10, at 27).

In 1973, after the detrimental effect of the optional zones was again called to the Board's attention, this time by HEW, they were abolished (S-34; Record, Vol. III, at 43-44).

That the defendants abolished the optional districts, after HEW notified Superintendent Manch that their maintenance would be considered a violation, does not remove the matter from this lawsuit. The segregative results that these optional

areas helped to cause remain today. Therefore, the Board actions with respect to this policy remain probative of the Board's segregative intent *vel non. Keyes, supra,* 413 U.S., at 210-211. In addition, it appears that the optional area in the Western portion of Woodlawn Junior High School's district remains today. This optional area, instituted in 1964 when the Board was fully aware of the detrimental racial effect such optionals could produce, effectively destroyed any chance that Woodlawn Junior High would have a substantial number of white students. *See* section IV-B of this opinion, *supra.*

The court concludes that the Board's transfer and optional areas policies were substantial contributing factors to the segregation at all levels of the PBSS, and that this segregative effect was clearly foreseeable by the Board.[38] The Board nevertheless deliberately continued to allow new transfers and optional movements every year until 1972, resulting in continued and increased segregation.

[75] IV-D. *VOCATIONAL-TECHNICAL HIGH SCHOOLS*

The six vocational-technical high schools of the BPSS have no set attendance areas. Unlike all the other schools in the system, the general rule is that any child can attend any of these schools, depending only on the space available and the individual student's ability to meet the scholastic qualifications.[39] Contrary to the situation in many school systems, these schools are considered of high quality (S-95). Plaintiffs allege that the Board discriminated against minority applicants to several vocational and technical high schools through a selective admissions process which had the effect of screening out minority students.

Prior to 1972, admissions criteria consisted of elementary school grades, a personal interview, and sometimes an additional test. At Hutchinson-Central Technical High School [Hutch Tech], an additional entrance exam was always required. Mr. Gardner, the former Board president, testified that in 1971 he concluded that "the policies of admissions to vocational and technical schools were being operated, to the Board's knowledge, in a manner which was discriminatory against black applicants." (Record, Vol. II, at 105). Mr. Gardner cited statistics (Record, Vol. II, at 106-110) that seemed to show that it was much more difficult for blacks to be admitted to McKinley, Seneca and Hutch Tech (which, in 1971, were 83.0, 82.5 and 85.1% majority, respectively) than Burgard, Emerson or Fosdick-Masten High Schools (then 41.7, 45.2 and 94% minority, respectively) (PX 7, at 21). The result was that "regardless of what the [Board's official] policy was, the system was, for some reason, operating as to make it more difficult for a black with a comparable record to be admitted to certain schools than for a white." (Record, Vol. II, at 112). Mr. Gardner's testimony was corroborated by the HEW survey of the BPSS (Record, Vol. III, at 50-54).

In June of 1971, a committee was formed by the Board to investigate the admissions procedure for the vocational and technical schools (PX 67). In February of 1972, on a recommendation of this committee, the procedures were revised so that admissions interviews and entrance tests would no longer be used at the vocational and technical high schools, except at Hutch Tech, where a revised entrance test would be used (PX 74). The committee's report noted that

> [e]ffort will be made to increase minority group representation in vocational and technical high schools on a fair and equitable basis to insure all students the right to an education based on needs and ability.
> (PX 74, at 3).

As the parties agreed in the stipulation, "[s]uch changes [in admissions procedures] have not significantly improved the racial isolation in the Buffalo vocational schools" [S-98(b)], and therefore the Board's revision of the discriminatory admissions procedures does not eliminate this area from our consideration. As we have pointed out before,

> If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."
> *Keyes, supra,* 413 U.S., at 210-211.

The Board does not deny that admissions for minority students at McKinley, Seneca and Hutch Tech were discriminatorily restricted, although it argues that the numbers involved are insignificant (Post-trial Brief for City Defendants, at 26).

Table 12, *infra,* shows that the numbers here are not insignificant. McKinley, Seneca and Hutch Tech are all in the 80% majority range, while Burgard and Emerson are approximately 46% and 44% minority. Fosdick is 98% minority. Given the substantial difference in enrollments of minorities at the two groups of schools, and given defendant Board's admission of discriminatory admissions policies at the predominantly white schools, it is not enough for the Board to say that this is a *de minimis* situation. In the Supreme Court's words, the Board has not shown that "a lesser degree of segregated schooling in the [vocational schools] would not have resulted even if the Board had not acted as it did." *Keyes, supra,* 413 U.S., at 211.

Fosdick-Masten Vocational School is the only all-female vocational high school in the BPSS.[40] Described by one witness as a "step-child" of the Board (Record, Vol. II, at 127), it has become increasingly more segregated since 1960 (PX 264, at 691; PX 6, at 23). As long ago as 1968, the Board planned to replace it (PX 164), and from 1970-1974, the Board allowed the school to linger on administrative death-row under the condemnation of urban renewal (Record, Vol. II, at 127). Fosdick-Masten was given a sudden reprieve when plans for the new East Side High School, which was to have absorbed the programs at Fosdick, were eliminated in the City's 1974-75 budget. *See* section IV-F(4)(b) of this opinion, *infra.*

The attendance figures for September 1973 and 1974, and the estimated capacities for each of the vocational-technical schools are presented in Table 12:

TABLE 12

VOCATIONAL HIGH SCHOOLS
CAPACITIES AND ENROLLMENTS

School	*1974 Capacity Estimate*	*1973 Sept. Enrollment*	*1973 Minority %*	*1974 Sept. Enrollment*
Burgard	1107	1087	45.8%	1070
Emerson	640	554	44%	625
Fosdick Masten	840	595	98.1%	626
Hutch Tech	1200	1157	19.8%	1172
McKinley	1160	1176	20.3%	1132
Seneca	1160	1166	20.0%	1157

SOURCE: DX 21; PX 6, at 23. (1974 Minority % not in evidence).

The Board attempts to absolve itself from any involvement in Fosdick's 98% minority enrollment by reiterating that the vocational-technical schools do not have any restricted attendance zone and that attendance at the schools depends on the choice of the individual student. But the Board does not act in a vacuum, and the actions it takes with respect to admissions at one vocational school will necessarily be felt at another. All the vocational-technical schools are close to full enrollment *except* Fosdick-Masten. See Table 12, *supra.* If admissions at Hutch Tech, McKinley and Seneca were non-discriminatory, and the number of blacks at these schools increased, the enrollments at the other vocational schools would necessarily be affected.

The court intimates no opinion on whether or not the revised policy on admissions implemented in 1972 (PX 74) is a sufficient answer to the segregative actions that occurred prior to 1972. All the court states is that, on the evidence before it, the discriminatory actions of the Board with regard to admissions at vocational-technical high schools had caused segregated conditions to exist at a significant number of those schools, and that, at the time this case was tried, these conditions continued to exist.

[81] IV-E. STAFF

As of 1970, the population of the City of Buffalo was 21% non-white. The numbers and percentages of non-white staff members of the BPSS, for the years 1967 to 1973, are presented in the following table.

TABLE 13

BPSS MINORITY STAFF

	1967-68	*1968-69*	*1969-70*
Principal	1 (1.2%)	1 (1.2%)	3 (3.6%)
Ass't. Principal	6 (6.8%)	6 (6.3%)	6 (6.4%)
Other Staff*	357 (10.0%)	367 (10.6%)	374 (11.1%)

	1970-71	*1971-72*	*1972-73*
Principal	5 (6.0%)	6 (7.2%)	13 (15.1%)
Ass't. Principal	7 (7.6%)	7 (7.9%)	4 (4.8%)
Other Staff	352 (10.0%)	369 (10.2%)	413 (11.4%)

* "Other Staff" includes teachers, counselors, librarians, etc.

SOURCE: PX 13.

The plaintiffs allege that the assignment of these underrepresented black teachers and principals generally to predominantly black schools, and the failure to recruit significant numbers of new minority teachers are further segregative acts and refusals to act by the Board of Education.

[82] 1. STAFF ASSIGNMENTS

The information in the following paragraphs, taken from the stipulations (S-20), indicates the extent of staff segregation in 1970 and 1973 in the BPSS.

In 1970, fifteen elementary schools in the 85-100 percent majority range had no black teachers, while 63.3 percent of the black elementary teachers were concentrated in fifteen predominantly black schools. In 1973, nine elementary schools that were 85-100 percent white were without a single

black teacher, and 57.6 percent of the non-white elementary teachers were assigned to fourteen predominantly black schools. The special elementary schools exhibited similar figures. In 1970, 41.6 percent of the faculty at the three predominantly minority special schools were non-white, while at the other three special schools only 5.6 percent of the teachers were non-white. In 1973, 28 percent of the teachers at the predominantly black special schools were minority; the average percentage of non-white teachers at the other four special schools was 3.1 percent.

The middle and junior high schools' staffing was similar. In 1970, Woodlawn Junior and Clinton Junior Highs, virtually 100 percent black, had minority teacher percentages of 25.9 and 10.9 percent respectively, while the predominantly white middle and junior highs had very few non-white staff. In 1973, the non-white faculty percentage at the two nearly all black schools averaged 28.7 percent; the comparable percentage at the other four schools was 8 percent.

In the academic high schools, 39 percent of all minority academic high school teachers in 1970 were assigned to East High, where they comprised 21.4 percent of the East faculty. The non-white teachers at the remaining six academic high schools ranged in representation from 3.7 to 12.9 percent of the individual school's staff. Three years later, 47.2 percent of the minority academic high school teachers in the BPSS were assigned to East. The East High minority teacher percentage was 32 percent, while the corresponding figures at the other six academic highs were between 2.1 and 9.7 percent.

The same situation existed in the vocational-technical high schools, where in 1970 the nearly all black Fosdick-Masten High had a non-white teacher percentage of 16.7 percent. Of the other five vocational-technical highs, none had a faculty

of more than 2.5 percent minority. In 1973, the Fosdick-Masten faculty was 23 percent minority, while the remaining five vocational high school faculties ranged from 1.6 to 6 percent minority.

This concentration of black staff in predominantly black schools dates back at least to 1960 (PX 264, at 690-707). The evidence at trial also showed that black administrators were disproportionately over-represented at black schools. In 1970, each of the four minority principals and each of the seven minority assistant principals were assigned to schools over 98% black (PX 264, at 718). In 1973, there were fourteen non-white principals: thirteen headed predominantly non-white schools [S-20(d)(ii)].

The importance of the staff issue is accentuated in this particular case because of its unique position *vis-a-vis* the other charges brought by the plaintiffs. The defendants cannot argue, as they have with respect to student segregation in the schools, that the fortuitous combination of residential segregation and a racially neutral neighborhood school policy combined to segregate the teaching staff of the BPSS.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Supreme Court noted that

> existing policy and practice with regard to faculty [and] staff . . . [are] among the most important indicia of a segregated system. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.
> 402 U.S. at 18 (Citation omitted).

Essentially the Board does not deny what the statistics detailed *supra* indicate—significant numbers of teachers and administrative personnel are assigned to schools under two racial criteria, the race of the teachers or the administrative personnel, and the racial makeup of the student population at the schools. Mr. Eugene Reville, Mr. Manch's successor as Superintendent of the Buffalo Public Schools, who was Associate Superintendent for Instructional Services at the time of the trial, testified that reassigments had been made to achieve a better racial balance in the school staffs (Record, Vol. VII, at 192-93). Some of this ameliorative effort was admittedly done under the coercion of a threatened fund cutoff from the Department of HEW (Record, Vol. VII, at 164-167). HEW had singled out three elementary schools with heavy black teacher concentrations, and nine elementary schools with no black teachers, and demanded that this situation be remedied. The Board's response was to lower the percentages of minority teachers at the three predominantly black schools and to assign black teachers to three of the nine previously all white staffs. Mr. Reville testified:

> I think very soon we will get a fourth [black teacher] into the nine schools *and this certainly isn't integrating the staffs, but we are moving in that direction.*
> (Record, Vol. VII, at 166-167).
> (Emphasis added).

Although it has acted under pressure from HEW to improve the staff racial balance, it is the contention of Superintendent Reville that the policy of teacher assignments based on racial criteria has a sound educational rationale. As Mr. Reville explained it, given the racial imbalances characterizing the BPSS, it is his belief that black teachers and administrators should be assigned to the predominantly black schools because of the need of black students for role models

and because the black teachers and administrators have greater understanding of the black community.[41]

It is thus plainly admitted that the Board has purposely followed a policy that has segregated, and was intended to segregate, the teacher and administrative staffs in the Buffalo public schools. Whether the Board's excuse for this action, to provide black role models for black students, is the real motivation behind the staffing according to race, is legally irrelevant. Whether desired by the majority or the minority, whether the motive be evil or benign, racial segregation in the public schools cannot withstand the proscriptions of the fourteenth amendment. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Morgan v. Hennigan*, 379 F.Supp. 410, 461 (D.Mass. 1974), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

Defendant Board of Education's theory, if carried to its logical conclusion, supports the complete separation of the races in public schools. One of the premises of *Brown*, and the many cases that have followed, is simply that segregation is harmful for both black and white children, and ultimately divisive and destructive for society. It is not contended by this court that minority role models are not important for minority students. Racial and ethnic pride has its value. But, in the constitutional scheme, a higher value in the hierarchy is integration. Integration, and the understanding it fosters, will provide both black and white role models for both black and white children. *See United States v. School District of Omaha*, 521 F.2d 530, 537-38 (8th Cir. 1975), *cert. denied*, ... U.S. ...., 44 U.S.L.W. 3280 (U.S. Nov. 11, 1975), in which the court, faced with the same role model rationale, stated *inter alia* that

> such a belief—if truly held—reinforces rather than undercuts the presumption of segregative intent with

respect to students, since it would logically suggest herding black students into their own schools where they could be taught by their proper black role models. The defendants are thus hoist by their own petard.
521 F.2d at 538-39, n.14.

[89] 2. STAFF RECRUITING

As we have already pointed out, the Buffalo population, according to the 1970 census, was about 21% non-white, while the public school population in Buffalo in October 1973 was approximately 47% non-white (S-9, 10).

The non-white teacher population, as indicated by Table 13, *supra*, was only 11.4% in 1972-73 and had not increased significantly since 1967-68. In fact, the evidence showed that the minority teacher percentage stood at 11% in 1965 (Record, Vol. III, at 29-30), and was estimated to be at just under 10% in 1962 (PX 10, at 19). Plaintiffs charge that these statistics are proof that the Board's recruitment practices discriminate against minority groups. At trial, they cited the failure, until 1974, to give teacher exams at recruitment locations, failure to advertise in a direct and intensified manner for minority applicants, and failure to make use of civil rights organizations as contacts or liaisons with the potential minority applicants [S-22(e)]. Mr. Gilbert Francis, who conducted the HEW review of the BPSS, testified for the plaintiffs that the efforts of the BPSS to enlist added minority teachers "[i]n many school districts . . . would be considered as properly inadequate." (Record, Vol. III, at 33-34).

The Board, through Mr. James Connors, Associate Superintendent for Personnel for the BPSS, detailed its attempts to hire additional minority teachers. He explained that college campuses throughout the eastern half of the United

States were visited and that "[o]ne of the main aims, particularly in the last five years, was to contact colleges and universities where there was a large black enrollment, to try to attact minority teachers to the Buffalo School System." (Record, Vol. IX, at 47-48). Notwithstanding these efforts, he said, 95% of Buffalo's public school teachers were hired from Western New York campuses (*Id.*, at 48). Mr. Connors stated that there were several obstacles his program stumbled against, including the tendency of recent graduates to teach in the area they attended school, competition with government, private industry and other school systems for minority applicants, and New York Education Law, § 2573 (McKinney's 1970), which requires only Buffalo and New York City to give a licensing exam for teachers (Record, Vol. IX, at 50-56). This test requirement of § 2573 is additional to state certification, which is the sole requisite in all other school districts in New York State (*Id.*, at 54-55).[42]

The recruitment efforts of the Board for the four schools years 1967-70 are laid out in the HEW compliance review (PX 264, at 679-685). The report reads in part:

> The charts [of recruitment data] reveal that there has been no significant increase in hiring of minority group teachers through the increased recruitment efforts of the school district. Visits to the predominantly black colleges have not produced any more black teachers than had been coming from those colleges in the years before the recruitment visits began (*Id.*, at 684).

Mr. Connors' testimony indicated that the same analysis could be made for the years 1970-74.

Some courts have held that such figures, as shown in Table 13, *supra*, themselves may constitute *prima facie* evidence of

intentional segregation. *See Crockett v. Green*, 388 F.Supp. 912, 917 (E.D.Wis. 1975), where the court stated:

> A substantial disparity between the proportion of minorities in the general population and the proportion in a specific job classification is sufficient to establish a prima facie case of discrimination.

See also United States v. Lathers International Local 46, 471 F.2d 408, 414 n. 11 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973). Though the Board did detail its efforts to improve minority staff hiring, the results were admittedly dismal. When compared to the moderate improvement in the minority percentage of principals and assistant principals from 1967 to 1973, the static under-representation of minority teachers is evidence of the Board's unwillingness to effect a similar change in the BPSS's teaching staff.

As Chief Judge Brown of the Fifth Circuit has stated, "figures speak and when they do, Courts listen . . ." *Brooks v. Beto*, 366 F.2d 1, 9 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). The Supreme Court has also indicated the persuasiveness of statistics. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the petitioner charged that citizens of Mexican descent were systematically excluded from the jury roles. The Court stated that

> [c]ircumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. *Hernandez v. Texas, supra*, 347 U.S., at 482.

We feel constrained to say that this court's credulity is also taxed by the failure of the Board to increase the minority teacher percentage, in any meaningful amount, in over ten years' time.

[94] IV-F. ***THE STATE INTEGRATION MANDATE***

The Board of Education[43] of the City of Buffalo has direct control over the BPSS, but its powers are limited in several fundamental respects. It is subject to State control by the Board of Regents and the State Commissioner of Education on matters of education and educational policy, as discussed *infra*. It is also totally dependent on the City Council and the State for its financial requirements.[44] Any capital improvement or other financially significant program conceived by the Board is destined to be stillborn if the Common Council denies the necessary funding.

The Board of Education's actions with respect to the siting and districting of Woodlawn Junior High School, the language transfer program at East High School, its general transfer and optional areas policies, its admissions procedures for vocational-technical schools, and its minority staffing and recruitment measures have already been discussed. A thorough study of Board action since the 1950's convinces this court that the already proven allegations of segregative actions and omissions are unfortunately not isolated incidents. The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.

The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration.

But however much the Board of Education or the City Council procrastinated or wavered, an equal share of the blame for the segregation in the BPSS must be attributed to the State defendants. The Board of Regents and the Commissioner of Education have the central responsibility for education in New York State. They have the tools necessary to effectuate the integration policy they devised and to enforce the law they were clearly aware of. The State defendants shirked their responsibility under the laws of New York State and the Constitution, and in so doing encouraged the City defendants to continue their own segregative actions. They, like the City defendants, must be held accountable.

[96] 1. NEW YORK STATE EDUCATION LAW

In New York State, full power over education is constitutionally vested in the State[45] and specifically in the Department of Education, which "is charged with the general management and supervision of all public schools and all of the educational work of the state." New York Education Law, § 101 (McKinney's 1969). The governing body of the University of the State of New York, the corporation formed in 1784 to charter and control schools in the State, is the defendant Board of Regents. New York Education Law, §§ 201, 202 (McKinney's 1969; Supp. 1976). The Board of Regents is the

statutory head of the Department of Education, and the Commissioner of Education, who serves at the pleasure of the Board of Regents, is the chief administrative officer of the department. New York Education Law, §§ 101, 303 (McKinney's 1969). The powers granted to the Commissioner under New York State statutes are extensive. In addition to the "power and . . . duty" to enforce statutes "pertaining to the school system of the state or any part thereof or to any school district or city," and "the power and authority to likewise enforce any rule or direction of the regents" [New York Education Law § 308 (McKinney's 1969)], the Commissioner is also granted judicial authority to hear and decide appeals from persons believing themselves aggrieved by actions of any school officials. In such appeals, the Commissioner's decision "shall be final and conclusive, and not subject to question or review in any place or court whatever." New York Education Law, § 310 (McKinney's 1969).[46]

As broad as these specific grants of authority are, the law provides for expansion of the Commissioner's legal clout:

> The regents may adopt rules conferring and imposing upon the commissioner of education such additional powers and duties as may be required for the effective administration of the department and of the state system of education.
> New York Education Law, § 301 (McKinney's 1969).

[98] 2. THE REGENTS' INTEGRATION POLICY

The actions of both the State Regents and the Commissioner of Education over the past two decades, and particularly since 1965, weave a saga of much talk and insufficient action, at least as far as the BPSS is concerned. As early as 1960, the Regents issued a policy statement urging the

desegregation of New York State's public schools (PX 28, Pt. II, at 11-12). Commissioner Allen, in 1963, stated:

> A special responsibility rests upon educators in this period. Not only must we act firmly and with all possible speed to eliminate segregation, *de jure* or *de facto*, but we must also give renewed emphasis to the teaching of the principles of equal rights and freedom that motivates our actions.
> (*Id.*, at 10-11).

In 1969, a report prepared at the request of the Board of Regents and the Commissioner of Education entitled "Racial and Social Class Isolation in the Schools" exuberantly claimed that "[s]ince 1900, the political and educational leadership in New York State had reacted positively in attempting to eliminate the inequalities resulting from *de facto* segregation." (*Id.*, at 7). Unfortunately action, in some instances, has not matched rhetoric.

In 1963, the Commissioner requested all school boards to notify the State Education Department of those schools in their systems having a black enrollment exceeding 50% [47] (PX 304, at 2). Guidelines for desegregation were drawn up, with primary emphasis on local control and local action to effect desegregation (PX 304). Included in the guidelines were the following statements:

> 4. . . . In establishing school attendance areas one of the objectives should be to create in each school, a student body that will represent as nearly as possible a cross-section of the population of the entire school district, but with due consideration also for other important educational criteria including such practical matters as the distance children must travel from home to school.

> 5. A "neighborhood school" offers important educational values which should not be overlooked. . . .
>
> 6. When a "neighborhood school" becomes improperly exclusive in fact or in spirit, when it is viewed as being reserved for certain community groups, or when its effect is to create or continue a ghetto type situation it does not serve the purposes of democratic education.
>
> (PX 304, Guiding Principles for Dealing with De Facto Segregation in Public Schools).

Almost immediately, the Regents and the Commissioner of Education were put to the test in Buffalo. In the words of the Chairman of the State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, "[g]reat problems of life require endless difficult reappraisals." (PX 305, at v). Unfortunately, the Commissioner of Education and the Regents at times stressed the "endless" and failed to reach the "difficult reappraisals."

[101] 3. THE YERBY DIXON APPEAL

After the districting of Woodlawn Junior High School in 1964, several Buffalo parents, on behalf of their school children, took an appeal to the Commissioner of Education charging that the BPSS was racially imbalanced, that the Board of Education refused to alleviate the imbalance, and that blacks were discriminated against in the recruitment and distribution of teachers. On February 15, 1965, the Commissioner held for the plaintiffs on their first two allegations and stated:

> I hold that in developing its pupil assignment policies and in planning for new school buildings, it is incumbent

> upon a board of education to take into account the continued existence or potential creation of a school populated entirely, or largely, by Negro pupils.
> *Yerby Dixon Appeal,* 4 Ed.Dept.Rep. 115, 117 (1965).

The Commissioner retained jurisdiction over the appeal, "pending the adoption by the Buffalo Board of Education of a plan for mitigating the problem of racial imbalance which meets with my approval." 4 Ed.Dept.Rep., at 118. The Board did not appeal the Commissioner's ruling.

At the time of Commissioner Nyquist's testimony in this lawsuit, ten and one-half years after Commissioner Allen's decision in the *Yerby Dixon Appeal,* the Commissioner still retained jurisdiction over the appeal, and still was not satisfied with the actions of the Buffalo Board of Education. Put more bluntly, in the words of the parties to this lawsuit,

> The Commissioner is aware that the Buffalo Board has done virtually nothing to enforce the order of February 15, 1965 through June 30, 1974, when an elected board took office. The Commissioner has no evidence that the newly-elected Board has complied or is planning to comply with the order.
> (S-137).

This court does not quarrel with the initial decision to defer to local authorities to solve what is admittedly a complex and demanding situation. Chief Justice Burger has suggested that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley,* 418 U.S. 717, 741-42 (1974). Both the Commissioner and the Regents acknowledge this concept (PX 304, at 2). But, when effective local action is not forthcoming, and no reasonable person[48] could expect that it will be forthcoming,

and repeated attempts at cajoling, pleading and coercing the local authorities into action have failed, there comes a time when those individuals with both the power and responsibility to act must assert themselves. Deference to local authorities is not an absolute and binding requirement. It is a policy decision with a defined and limited rationale, *i.e.,* that the local authorities have a greater degree of knowledge and insight into the complexities of local concerns. However, when the local authorities refuse to accept the responsibility that is theirs, State authorities have no recourse but to act. Neither the Commissioner nor the Regents did so in the case of the Buffalo public schools. A brief review of the decade following the *Yerby Dixon Appeal* delineates the culpability of the Regents and the Commissioner of Education, as well as that of the Common Council and the Board of Education.

[104] 4. THE DEFENDANTS' RESPONSES TO THE *YERBY DIXON* ORDER

a. *The Board of Education's Integration Plans: 1965-1969.*
Commissioner Allen ordered the Board of Education to

> prepare, approve and submit to me on or before May 1, 1965 a plan for the progressive elimination of racial imbalance, including the steps to be taken in this direction beginning with the school year 1965-66.
> *Yerby Dixon Appeal, supra,* 4 Ed.Dept. Rep. at 118-119.

The plan submitted by the Board did not meet with the Commissioner's approval. He stated at the time that "[i]t fails to come to grips realistically with the problem or to present a long-range solution or to identify the barriers which must be overcome in order to reach a solution." (PX 278, at 4).

A citizens' committee was appointed by Commissioner Allen to assist him on the desegregation problems, and the

Buffalo Board asked the State Education Department to lend its help. The advisory committee in August of 1966 submitted to the Board of Education a proposal drafted by the New York City Center for Urban Education, which included the use of a middle school concept to aid the desegregation effort. In September 1966, Commissioner Allen ordered the Buffalo Board to again submit a further plan for desegregating the BPSS. A 16-point proposal was approved by the Board and sent to the Commissioner in November 1966.

This plan provided for assignment to peripheral schools of as many 6th to 8th grade inner-city pupils as could be accommodated, and for the establishment of a "Coordinator of Integration" to facilitate "quality integrated education." (PX 278, at 6-7). In April of 1967, the Board sent to the Commissioner its proposals for effective implementation of the previous November's plan. It recommended the establishment of Fillmore Junior High as a demonstration middle school, and proposed that new middle schools be limited to one-third black membership. It also proposed that all middle schools be located in predominantly white areas of the city. The Board specifically stated that white students would not be transported to non-white neighborhoods.

This plan also failed to meet the Commissioner's expectations and approval. He labeled it "disappointing and unsatisfactory, lacking specificity and devoid of any real evidence of a serious intent on the part of the Board to significantly reduce racial imbalance in the Buffalo School System." [S-101(b); PX 278, at 8]. The Board was again ordered to submit a detailed plan. In late January 1968, three years after the original demand from the Commissioner, the Board produced a new plan, "Recommendations for Achieving Quality Integrated Education in the Buffalo Public Schools." (PX 278, at 8). This new proposal detailed the results of the desegregation efforts since 1965. As of January 1968, the School Board reported, 1200 inner-city pupils were being bussed to peripheral schools, and the projected increase in this number for September 1968 was an additional 250. Also, 130 children from predominantly black schools were assigned to South Park High School and another 130 from nearly all black School 31 were attending Southside Junior High School.

The central feature of the Board's new plan was to restructure all the public schools on a 6-4-4 basis as follows: (1) Pre-kindergarten to fourth grade would be located in neighborhood schools and would service a sufficiently small area that walking to school would be possible; (2) Fifth to eight grades would be in a series of middle schools, some new, some converted junior highs. These middle schools would be situated in peripheral neighborhoods and be distributed so that their racial composition would reflect that of the district as a whole, and so that two-thirds of the pupils would live in the immediate area; (3) The ninth to twelfth grades would be in the regular high schools, thus requiring that ninth grades from junior highs be absorbed in the high schools. (PX 278, at 9-12). This middle school plan, often referred to as the 4-4-4 plan, would have effectively integrated the fifth through twelfth grades, but would have left grades one through four in their existing segregated state. [S-120(b)].

The plan made the following specific proposals: converting Genesee-Humboldt Junior High and Southside Junior High into middle schools, developing initiatives to integrate Woodlawn Junior High School,[49] and either integrating East High School proper or distributing its students to other high schools (S-102). The Board also endorsed the "educational park"[50] concept to promote economic and educational efficiency, and to facilitate future metropolitan integration as

population shifts occur. A $40,000 planning appropriation for a metropolitan educational park was recommended. (PX 278, at 14-15).

The Commissioner ordered that the Board report to him by November 15, 1968 on the actions taken to activate the proposals of this plan. In its November 1968 report, the Board detailed its efforts to date to the Commissioner (PX 271), noting that at that time, three and a half years after the Commissioner's original order to desegregate the BPSS, some 2,000 inner-city children were being transported to so-called "receiving" schools. The Board also reported the difficulty it was having with two phases of its desegregation program: its proposal for the use of portable classrooms and appropriations for middle school planning. The Board's difficulty was due in large part to Common Council opposition.

b. *Common Council Opposition*. To increase the capacity of the designated receiving schools on the inner-city periphery, the Board had agreed in May of 1968 to purchase 24 portable classrooms. They were to be placed at twelve of the predominantly white receiving schools [S-112(a)], and would accommodate 450 minority youths from Clinton and Woodlawn Junior Highs.[51] Within six days of the Board's decision, the Common Council requested the Corporation Counsel to draw up whatever legislation would be necessary to outlaw such portable classrooms. [S-113(a)]. Against the express advice of the Corporation Counsel, who warned that the proposed ordinance was "discriminatory in purpose, nature, and object," [S-116(b)], the Common Council enacted an ordinance that required any addition to a school to be constructed with the same material as the permanent school building.[52] (S-114). The ordinance, which effectively prohibited the portable classrooms, was vetoed by the Mayor (S-

116), but the veto was subsequently overridden by the Common Council. (S-117). The Board of Education then took the City and the Common Council to court, and succeeded in having the ordinance declared unconstitutional. *Board of Education v. Buffalo,* 57 Misc.2d 472, 293 N.Y.S.2d 421, *aff'd* 302 N.Y.S.2d 71, 32 App.Div.2d 98 (4th Dept. 1969). The Common Council's action delayed the portable classroom plan at least one year. (S-119).

It is undisputed that the core feature of the Board's 1968 integration plan submitted to the Commissioner was the middle school program. [S-120(a)]. Had it been implemented, integration could have been achieved on a broad scale.[53] From the outset, however, the middle school concept faced stiff opposition from the Common Council and, at the time of trial, the comprehensive plan for a city-wide system of six middle schools lay dead, with only two schools to mark its demise.[54]

The Common Council's opposition to the middle schools plan was not long in forming. A new junior high school[55] in the Riverside area was under construction at the time the Board agreed in 1968 to restructure the schools into the 4-4-4 format. Bond issues had been approved by the Council to cover the initial financing of the new school, and construction in mid-1968 had passed the half-way point. [S-122(a)]. Consistent with the proposed district-wide middle school plan, the Board changed the nascent junior high into a middle school. But, when the bond issue for final funding was submitted in late July 1968, the Common Council turned it down. [S-122(a)].

This action provoked considerable community uproar[56] and prompted then Superintendent Manch to state: "The issue is integration just as it was on the portable classrooms." [S-122(c)]. Eventually the Common Council did approve the

bond issue; the school was built and opened as the West Hertel Middle School. (S-123).

The City defendants argue that since the school was built, the Common Council's actions are not probative of segregative intent. This argument might hold some water if the Common Council's action in allowing the West Hertel school to be completed signified its intent not to obstruct the 4-4-4 plan. Unfortunately, the decision to fund the school was apparently a case of the Council's deciding to choose what it considered the better of two evils: abandoning a school that was more than one-half completed, or acquiescing in its completion as a middle school. In July of 1968 and in June of 1969, resolutions approving planning funds for the balance of the middle school program were turned down by the Common Council. (S-124, 125). The Common Council's opposition to the Board's integration efforts has been a substantial factor in the continued and increased segregation in the BPSS. There can be no doubt that its actions were intended to achieve that result.

The plaintiffs also charge that the Common Council's refusal to negotiate a lease or purchase of Bishop Ryan High School from the Buffalo Catholic Diocese was a segregative act. When Bishop Ryan was closed in 1971, the Board of Education drew up a proposal to use that school to relieve overcrowding at Southside Junior High and South Park High Schools. Under the Board's plan, ninth grade students at both schools would attend Bishop Ryan.

Since additional funding was required to obtain the school, the plan was submitted to the Common Council. The evidence at trial showed that during discussions with the Board, the Council requested assurances that the racial composition of the student body at the school be the same as when the diocese

ran it, or at least not a greater percentage of black students than would have attended ninth grade at South Park High. Mr. Gardner, the ex-President of the Board of Education, testified that while this plan was being considered, residents of the Bishop Ryan area wrote to Board members expressing their opposition to the Board's use of the school. He described this opposition as racially motivated. On cross-examination, Mr. Gardner admitted that the Bishop Ryan building had once been owned by the BPSS, but had been abandoned for some reason, and that the stated purchase price of $1,000,000 was excessive in view of the condition of the building. (Record, Vol. II, at 168-69, 176).

The evidence is not sufficient to find that the Common Council's refusal to even negotiate with the Catholic Diocese was substantially motivated by segregative intent. However, the Council's insistence on limiting the number of blacks that would have attended the school, had it been purchased or leased, is further evidence of the Council's resistance to the Board's integration proposals.

Another plan of the Board's to alleviate crowding at South Park High was a new East Side High School, which was also designed to replace Fosdick-Masten High School, provide facilities for new programs and allow redistricting of East High to end that school's severe racial imbalance. The planning for this school consumed ten years, and Mr. Gardner testified that "[t]here is no site that has ever been selected for a school in Buffalo that was more carefully worked over." (Record, Vol. II, at 23-24). The proposed school site, on William Street on the City's east side, had already been purchased, and 4.6 million dollars borrowed, when the school was dropped from the City's 1974-1975 budget. Mr. Gardner testified that some citizens had expressed racial opposition to the project and that "the principal reason for the abandonment of this project was racial." (Record, Vol. II, at 35).

To contradict Mr. Gardner's testimony, the City defendants called Mr. James Burns, Commissioner for the Department of Administration and Finance, whose job it is to make budget recommendations to the Mayor. Mr. Burns testified that because of Buffalo's severe fiscal problems and because City planners projected that only 60% of the new school would be needed by the time it could be opened, he recommended that the East Side High School project be abandoned. (Record, Vol. VIII, at 116-119, 129). Mr. Burns admitted that the City budget officials did not confer with Board members, but denied that the action was racially motivated. (*Id.*, at 119, 128-130).

Although the court finds it surprising that the City's decision to suspend, perhaps permanently, the proposed East Side High School was made without any consultation with School Board officials, especially in light of a decade of planning, the evidence is not sufficient to prove that segregative intent was a substantial factor in this decision.

c. *The Board of Education's Integration Plans: 1969-1972.* Commissioner Nyquist,[57] replying to the Board in June of 1969 about the Board's November 1968 proposals, cited statistics that showed that little actual integration had been effected. Mr. Nyquist stated: "Despite the progress described in the report [of November 1968], the conditions which prompted an appeal to the Commissioner of Education [*i.e.*, the *Yerby Dixon Appeal*] by the parents of Negro children still exist." (PX 272, at 2). It was then more than four years after Commissioner Allen's *Yerby Dixon* decision; the Board's responses had failed repeatedly to satisfy the Commissioner; and the segregation in the schools that prompted the *Yerby Dixon* decision had not been substantially alleviated. Mr. Nyquist requested the Board to notify him within one month of its plans for that fall.

After the Board's next report, Commissioner Nyquist stated in a letter dated August 1, 1969 that "[i]t is apparent from the [Board's] report [of July 14] that there is forward movement in several respects," noting in particular the planned opening of integrated West Hertel Middle School, the use of portable classrooms located at peripheral schools for 300 inner-city students, the expected increase of inner-city transfers to peripheral schools from 2043 to 2600, and the possibility of suburban school district cooperation. (PX 276). This forward movement proved to be short-lived.

As one of its efforts to meet the Commissioner's demands, the Board had requested Superintendent Manch to initiate discussions with suburban school districts to enlist their assistance in the desegregation efforts. The evidence at trial indicated that only the Williamsville Central School District reacted favorably to whatever overtures Superintendent Manch made. However, a plan to transfer a small number of inner-city students to Williamsville schools was quickly rejected by the residents of that suburb.

The Board apparently continued to file reports with the Commissioner's office, outlining the progress it claimed to have achieved,[58] but over the next two years very little else was done by the Board or the State. Then, in January 1972, Commissioner Nyquist's interest was apparently renewed and he wrote the Buffalo Board:

> Review of the reports submitted to me shows that, while many worthwhile efforts have been made and successes achieved, the problem of racial imbalance in the Buffalo schools is still a long way from solution.

Commissioner Nyquist also stated:

> *Faced with the hard fact that segregation is more severe in Buffalo now than it was seven years ago,* with over 20 schools more than 90% black, and 29 schools 90% or more white, it is clear to me that only a new approach can equalize educational opportunity for the children of Buffalo. (PX 103, at 1, 2). (Emphasis added.)

Commissioner Nyquist ordered the Board to devise a new plan that would integrate the early years as well as the 5 through 8 and 9 through 12 grades, although he did not completely rule out a 4-4-4 plan. The Commissioner gave the Board a little over two months to submit a desegregation plan "under which every school would substantially reflect the racial composition of the entire district." (PX 103, at 3).

Following seven years of weak leadership and continued acquiescence in the Board's dilatory actions, this stern and comprehensive order provoked, perhaps predictably, a strong and divisive reaction among Board members.[59] Much of the Board's debate over the Commissioner's new order centered on the question of bussing. Ultimately, the Board approved by a 4 to 3 vote a motion to inform the Commissioner that the Board was unable to develop the requested April 1, 1972 desegregation plan (PX 108). At the same Board meeting, the Board went on record as being opposed to any type of forced bussing and also voted to file its own staff's report, "A Study of Desegregation" (PX 111), called the Heck Report.[60]

The Heck Report was the product of a year's work, and was produced in response to a Board request for a study on a cross-bussing program for Buffalo and the use of existing buildings for the middle school program. It proposed a restructuring of the BPSS into five large neighborhoods, each

extending outward from the center of the City. The resultant racial balance at each school level was estimated to be from 30 to 45.9% black. The report stated that "[u]tilizing a variance of plus or minus 10%, it is feasible to assume racial balance for each [elementary] school at each level." (PX 106, at 29). The study recommended certain existing schools that would be converted to middle schools to achieve the Board's 4-4-4 plan, and integration in the 1-4 level was also provided for. The high school program was reported to need further study before detailed proposals to achieve full integration could be made (PX 106, at 30).

After the Board had refused to develop the requested April 1972 desegregation plan, the Commissioner sent a State task force to Buffalo in May of 1972 to develop a State plan for integrating the BPSS. The State task force proposed two alternative plans, the first being the Heck Plan and the second being a modified version of the Heck Plan (PX 278, at 39-92), both of which were submitted to the Board in mid-November of 1972 with a request that the Board respond by January 3, 1973. These plans were also rejected by the Board, and, according to the Commissioner, this action by the Buffalo Board "more or less closed the door on any cooperative effort." (PX 298, at CW 7.5).

By January of 1973, some five years after the Board's 4-4-4 plan was adopted, only one middle school had been constructed, and only one other had been converted from a junior high. The Board's 1968 proposal had noted that "Fillmore Middle School is the initial step in a long-range program to place all children in grades 5-8 in integrated middle schools." (PX 271, at 10). Fillmore Middle *was* the initial step, being converted to a middle school in 1967, but, as of October 1972, it could hardly be called integrated, with a minority enrollment of 82.5% (PX 7, at 19). West Hertel Mid-

dle School, opened in 1969, was the second and last step in the Board's "long-range" 4-4-4 plan.

The following table shows that the junior high school system remained heavily segregated as of October 1973.

TABLE 14

MIDDLE AND JUNIOR HIGH RACIAL COMPOSITIONS OCTOBER 1973

Fillmore Middle	—	89% minority
West Hertel Middle	—	71.6% majority
Clinton Junior High	—	100% minority
Genesee Humboldt Junior High	—	90.9% minority
Southside Junior High	—	84.6% majority
Woodlawn Junior High	—	99.6% minority

SOURCE: PX 6, at 21.

The 1968 plan for integrating the public schools, the only plan even provisionally acceptable to the Commissioner of Education (PX 105, at 6), had been a nearly total failure:

1. Southside Junior High had not been converted to a middle school, and its racial imbalance in 1973, 84.6% majority, was worse than in 1969, when it was 76.4% majority.

2. No action had been taken to desegregate Woodlawn Junior High.

3. Neither of the alternative plans to avoid the segregated status of East High School—integrating the school or redistributing its pupils to the other high schools—had been effectuated.

4. The Board had not approved any educational parks.

5. The middle school program had floundered after only two middle schools were established.

(S-103).

Eight years after the *Yerby Dixon Appeal*, it was clear that the Board had not accepted, and would not accept, the responsibility to integrate the Buffalo schools.

d. *The State Defendants' Response to City Defendants' Inaction*. Two broad and specific enforcement powers are granted to the Commissioner of Education under New York Education Law: removal of school officers and withholding of funds for "wilfully disobeying any decision, order, rule or regulation of the regents or of the commissioner of education." New York Education Law, § 306(1) (McKinney's 1969). Commissioner Nyquist was well aware of the powers that he was authorized to use.[61]

In August 1973, after the Board rejected the State's integration plan, and after the Board president had written the Deputy Commissioner of Education that

> if your discussion with [the Board] should in any way involve forced bussing then, in view of the attitudes of the majority of the Board, there would be no point to such a discussion.
> (PX 267).[62]

the Commissioner had a show cause order drafted (PX 298, at CW 7.5). This show cause order, a necessary prerequisite to either removal of school officials or withholding of funds [New York Education Law, § 306(1) (McKinney's 1969)], had not been served as of the day this case was tried in October of 1974.[63]

Mr. Nyquist admitted at trial that between January 1972, when he requested the full scale integration plan, and the date of trial, nothing of consequence had happened: "maybe minor decisions, but very minor. I see no real substantive change." (Record, Vol. V, at 39). In addition, Mr. Nyquist agreed that the Board's actions "clearly and unequivocally violate the Regents policy" and that the Board had willfully defied the Commissioner's instructions (Record, Vol. V, at 39-40). The Commissioner testified: "I don't think you can achieve racial desegregation here in Buffalo without an order from the Commissioner or from the Court." (Record. Vol. V, at 43). Mr. Nyquist's excuse for not having brought a show cause order to make the *Yerby Dixon* decision a final order, that he was incapacitated by a heart attack, is not persuasive. The State's authority cannot be so dependent on the health of any one person, and New York State law authorizes the Deputy Commissioner to fill in for a disabled Commissioner.[84] The State defendants argue that "it is only required that they take reasonable steps to implement Regents' policy and to enforce the Commissioner's order of February 15, 1965 [Yerby Dixon]. This they have done." (Post-trial Brief for State Defendants, at 15). Without considering whether the State defendants correctly interpret the law, this court is convinced that neither the Commissioner nor the Regents have taken "reasonable steps" to alleviate the segregation in the BPSS. At the time this case was submitted for decision, ten and one-half years had elapsed since the 1965 *Yerby Dixon Appeal* and no significant improvement in desegregating the public schools in Buffalo had taken place. The Commissioner's actions over those ten years amount to a mountain of paper work with little substantive results. The lack of effective action by the Regents and by the Commissioner of Education has continued, and in some instances aggravated, racial segregation in the Buffalo public schools.

It is significant when considering the protracted negotiations between the Board and the Commissioner's office, which continue to this day, to ponder the hypothetical situation posed by plaintiffs' counsel at the final arguments. If the Buffalo School Board had decided to shorten the state-mandated 190-day school year [New York Education Law § 3204(4)(a) (McKinney's Supp. 1976)], on its own initiative, one would expect the State to react with great alacrity to enforce its attendance statute. Yet, this decade-old integration mandate has been "more honour'd in the breach than in the observance." (W. Shakespeare, Hamlet, I, iv, fourteen).

e. *Mayoral Action.* At the time this suit was filed, School Board members were appointed by the Mayor, subject to the confirmation of the Common Council [New York Education Law, § 2553(3) (McKinney's 1970)]. The plaintiffs allege that the late Mayor Frank A. Sedita's appointment of Mrs. Carol Williams to the Board of Education in early 1972 was done with segregative intent. This appointment occurred just after Commissioner Nyquist had requested the Board to submit an integration plan that would effect a racial balance in each school approximating the district-wide percentage.

As the Supreme Court stated in *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), such an allegation presents a sticky judicial and legal problem because "judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency." 415 U.S., at 615. Because the Supreme Court ruled that there was no proof of discriminatory appointments in the *Mayor of Philadelphia* case, it did not resolve this problem. 415 U.S., at 621.

In the present case, the only evidence of the Mayor's intent is a quote from a letter he once wrote indicating that he ap-

pointed Mrs. Williams because she was opposed to cross-bussing [S-130(b)]. We feel that this is insufficient evidence to find discriminatory intent on the part of the Mayor.

[128] IV-G. *CONCLUSION ON SCHOOL EVIDENCE*

As the Supreme Court has often noted, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). The same can be said for the motivation or motivations behind the actions of a school board or board of regents. When, however, the court is faced with a decade and more of intransigence and obstruction, of delay and procrastination, the interpretation of motivation becomes less difficult. The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Commissioner of Education and the Board of Regents intentionally created and maintained, in substantial part, the segregation in the BPSS.

The court again notes that some efforts were made to alleviate the segregation and promote integration. Specific examples include the Board's voluntary integration program that enable some 2,600 inner-city youths to attend peripheral schools, compensatory education programs, and the increase in minority administrators. But these steps were inadequate in themselves [*see* the district court opinion in *Bradley v. Milliken*, 338 F.Supp. 582, 591-92 (E.D.Mich. 1971)], and their beneficial results were substantially nullified by contrary actions, such as the transfer and optional area policies that resulted in 2,000-4,000 white students shifting to predominantly white schools as the court has discussed *supra*, in section IV-C of this opinion.

The plaintiffs have proved that various schools in the BPSS are segregated, that this segregation was intentionally caused by the defendants, and that a substantial and meaningful portion of the school district has been intentionally segregated. There is no need, as the *Keyes* case explains, for the plaintiffs to prove *de jure* segregation as to each segregated school or student in the system:

> [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.
> *Keyes, supra*, 413 U.S., at 201.

The language transfer device that allowed white students living in the East High School district to avoid East and attend South Park or Kensington Highs; the districting of Woodlawn Junior High in 1964 that guaranteed an all-black student body; the transfer and optional areas policies that enabled white students to avoid schools with substantial numbers of minority students; the discriminatory admissions practices at some vocational high schools; the assignment of teachers and administrators on the basis of race; the discriminatory hiring practices of the Board; the refusal of the Board of Education to devise and implement an effective integration plan; the Common Council's obstruction of positive integration steps that the Board did take; the failure of the Board of Regents and the Commissioner of Education to take effective steps to end the segregation in Buffalo's public schools—all of these are evidence of a systematic program of segregation.

Defendants have not met their burden of showing that the instances of segregation were not caused by their design or device. *Keyes, supra,* 413 U.S., at 210. The evidence of segregative acts, briefly catalogued in the preceding paragraph, demonstrates the inadequacy of the City and State defendants' defenses. The Board's "neighborhood school" policy, long cited as a racially neutral, rational assignment device, stands exposed as a shibboleth. It was followed when its results were seen as acceptable; it was disregarded and subverted when the Board saw fit. When the City defendants do admit segregative actions, they attempt to minimize their responsibility by claiming that the segregative effect was "not substantial." (Post-trial Brief for City Defendants, at 14, 15, 21, 22, 26, 30, 31). The evidence proves otherwise.

The State defendants' attempt to wash their hands of any involvement in the segregation that characterizes the BPSS, by claiming they have done all that is legally required of them, is similarly unpersuasive. Nothing could have encouraged the City defendants' procrastination and recalcitrance more than the lack of effective action by the State defendants. In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation.

Notwithstanding the culpability of the City and the State defendants, the court does acknowledge that some efforts by all defendants, evidencing various degrees of support for desegregating the BPSS, were shown. Unfortunately, these efforts were too insignificant to alleviate the constitutional harm that had been done.

[133] IV-H. *HOUSING*

[133] 1. THE EVIDENCE

None of the parties to this lawsuit dispute the existence of severe residential segregation in the City of Buffalo, nor do the parties dispute the fact that the housing problems have contributed to the racial isolation and imbalance present in the Buffalo public schools. The City defendants claim that the housing segregation is the direct cause for the school segregation, that they are blameless for the existence of residential segregation and are not constitutionally required to correct it (Answer for City Defendants at ¶¶ 17, 19; Post-trial Brief for City Defendants, at 1). Consequently, they argue that any evidence regarding the housing situation is irrelevant to the issue: intentional segregation in the BPSS (Record, Vol. IV, at 143, 161-162, 173; Vol. V, at 110-111; Vol. VI at 10). The State defendants agree that the housing evidence should have been stricken at trial as irrelevant. In addition, they argue that they have no legal responsibility for housing matters in New York State (Post-trial Brief for State Defendants, at ¶¶ 36, 37).

The plaintiffs introduced evidence tending to show that both the containment of minorities in certain areas of the City, and the exclusion of minorities from suburban areas, did not occur by chance. This evidence can most easily be discussed by dealing with the allegedly discriminatory parties seriatim: (1) The Federal Government; (2) The Buffalo Municipal Housing Authority [BMHA], (3) The Real Estate Industry, and (4) The City of Buffalo.

(1) *The Federal Government*

During the 1930's, the Federal Government's explicit policy, as described in the Underwriting Manual of the Federal Housing Administration [FHA], was to keep racial populations separate. When rating a location, FHA valuators were advised that protection from adverse influences was "one of the most important features." (PX 228, pt. II, at ¶ 226). Adverse influences were defined to include "infiltration of inharmonious racial or nationality groups." (*Id.*, at ¶ 310). The valuators were further advised to award high ratings only to those areas where the most effective exclusionary devices, such as zoning regulations and deed restrictions, were employed, "inasmuch as these provide the surest protection against undesirable encroachment and inharmonious use." [*Id.*, at ¶ 284(1)]. It was specifically recommended that a "[p]rohibition of the occupancy of properties except by the race for which they are intended" be included in the deed restrictions. [*Id.*, at ¶ 284(3)(g)].

The Federal Government also funded housing projects, especially war housing, that were purposely segregated (PX 229, at 3; *see* (2), *infra*).

(2) *The Buffalo Municipal Housing Authority*

As shown in Table 15, four major public housing facilities were constructed in Buffalo in the late 1930's under the aegis of the BMHA, a municipal corporation formed under the laws of New York State by the City of Buffalo in 1934 [PX 229, at 2; *see* New York Public Housing Law §§ 403, 404 (McKinney's Supp. 1976)].

TABLE 15

BMHA HOUSING PROJECTS - 1930's

Project Name	*Location*	*Units*	*Racial Makeup*
Lakeview	W. Side, Waterfront	668	All white
Commodore Perry	Louisiana Street	772	All white
Willert Park	Jefferson Avenue & William Street	172	All black
Kenfield	Kensington area	658	All white

SOURCE: Record, Vol. IV, at 145-152; PX 229, at 3.

[The Kenfield project was originally built as a PWA project, but was taken over by BMHA. (Record, Vol. IV, at 151)].

This segregation in public housing continued as new housing was constructed during the war years, as shown in Table 16 below.

TABLE 16

BMHA HOUSING PROJECTS - 1940's

Project Name	*Location*	*Units*	*Racial Makeup*
LaSalle Courts	North W. City Line	206	All white
Langfield Homes	Kensington area	594	All white
Carver Apts.	William Street	42	All black
Talbert Court	William Street	73	All black
Ti-o-run-da	Cheektowaga	1,050	All white
Sheridan-Parkside	Town of Tonawanda	1,200	All white

SOURCE: Record, Vol. IV, at 155-158; PX 229, at 3-4.

[These public housing projects were managed by BMHA through Niagara Frontier War Housing. (PX 229, at 3)].

The testimony at trial demonstrated that these various projects, whose locations are indicated on map 5, *infra*, were built in either white or black residential areas, and remained totally segregated through about 1950. (Record, Vol. IV, at 168).

Newspaper articles from the 1940's submitted into evidence refer to Willert Park as specifically designated for Negroes. (PX 207, 208, 210, 212). When Willert Park became overcrowded and many black defense workers were in need of housing, an additional 200-unit facility was authorized in 1941 by the Federal Government, specifically for Negroes. (PX 213, 214). Several white residential sites were selected, including Cheektowaga, South Buffalo, and the Fillmore-Eagle Streets area. In each of these areas, public protests arose and the site was rejected. (PX 214, 215, 216 and 221). Among the remarks attributed to protesting community spokesmen at the time were the following:

> Of course the Negro workers should be taken care of but this is not the place. There are none living or working here now,

and

> The Negroes, who are certainly in need of better living conditions, would be far happier were they given a city of their own outside of Buffalo.
> (PX 215 and 217).

Ultimately, in addition to the all-black Willert Park project was built. (Record, Vol. IV, at 176).

The evidence at trial was conflicting as to whether or not the public housing projects are still segregated. Mr. Victor Einach, who worked for the BMHA from 1939 to 1940, and with the New York State Division on Human Rights from

1941 through 1973, testified that most of the units "are pretty well integrated." (Record, Vol. IV, at 169). However, Mr. Cleon Service, a black realtor with some forty years' experience in the Buffalo real estate market, and the vice-president and member of the executive committee of Housing Opportunities Made Equal [HOME], testified that even after 1946, when the BMHA had agreed to end its segregative housing assignments, such segregative actions continued, and that

> it wasn't until 1970 that we actually were able to sit down with them and work out what we felt was the beginning of a satisfactory resolution of their practices of discrimination and assignment and refusal to transfer blacks from the predominantly black projects at that time.
> (Record, Vol. IV, at 179).

Mr. Anthony Dutton, a member of the Board of Directors of Home, testified that the public housing administered by the BMHA was still heavily segregated, as the following table indicates, as of 1966.

Appendix C—Decision and Order Dated April 30, 1976.

TABLE 17

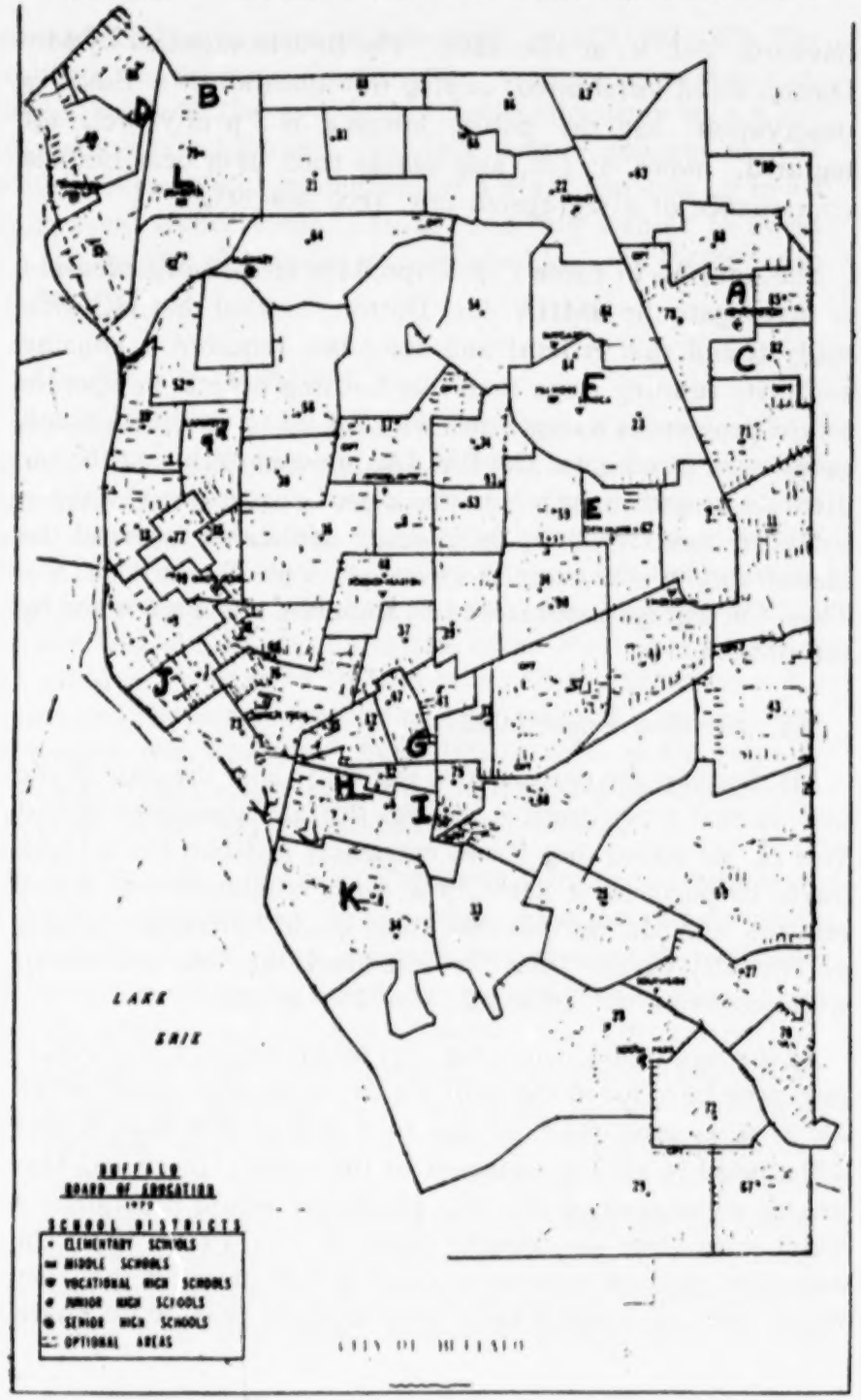
Project Name	*Units*	*Racial Makeup*	*Location*
Kenfield	658	3% black	A
LaSalle	206	3% black	B
Langfield	594	6% black	C
Shaffer	233	3% black	D
Ferry-Grider	210	6% black	E
Kensington Heights	371	6% black	F
Willert Park (including extension)	472	100% black	G
Ellicott Mall	590	99% black	H
Talbert Mall	763	99% black	I
Lakeview	668	23% black	J
Commodore Perry	772	19% black	K
Jasper Parish	212	13% black	L
Commodore Perry Ext.	472	58% black	K

SOURCE: Record, Vol. V, at 125-128.

[Location of these projects shown on map 5, *infra*].

Mr. Dutton stated that he relied on BMHA's Research Division for the statistics, and that no appreciable change in these statistics had occurred by 1970.

Appendix C—Decision and Order Dated April 30, 1976.



(Record, Vol. V, at 124, 125).[65] The figures supplied by Mr. Dutton stand unrebutted, calling into question Mr. Einach's observation that the public housing is "pretty well integrated," *supra,* at 138, and census tract data bear out the continuance of a segregated city. (PX 289-293).

The statistics in Table 17 prompted the HOME organization to investigate the BMHA. Mr. Dutton testified that HOME's study found that federal and state law required a housing authority running more than one housing project to operate all the projects as a single unit with regard to application and assignment of tenants. The BMHA, however, allowed the individual project managers to make use of an informal waiting list procedure, which enabled white applicants to avoid the identifiably black projects (Record, Vol. V, at 129-137). Thus, the segregation initiated by the FHA was maintained by the BMHA.

(3) *The Real Estate Industry*

Mr. Service, the realtor, also testified about the state of the private real estate business in the Buffalo area after World War II. He stated that it was extremely difficult for a black buyer to purchase a home in a white neighborhood. White realtors told Mr. Service that "they could not either morally or ethically permit [him] to sell black families into an all white community." (Record, Vol. IV, at 182).

In the late 1950's, when the real estate industry in the Buffalo area introduced the multiple listing system, under which all brokers send their listings to a central file that is then distributed to all the members of the system, there was fear among white brokers that this procedure would precipitate a black influx into the suburbs (Record, Vol. IV, at 187). The suburban realtors were so worried at this prospect that they broke off and formed their own separate real estate board

from which blacks were excluded (*Id.*, at 187, 191-192). The problem was so acute in the white realtors' eyes that they devised a system that avoided a black realtor showing a white prospective buyer a home, even in a *white* neighborhood. The white brokers "felt any incident of a black showing up in all white areas would create a furor, and they wanted to avoid it." (*Id.*, at 189). This practice continued into the 1960's[66] (*Id.*, at 191).

(4) *The City of Buffalo*

All three of the above forces had helped to cause the black population in the City of Buffalo to be squeezed into a central city area in the 1950's. At that time, the Ellicott District redevelopment, an urban renewal program, resulted in the City's purchase of large areas of the Ellicott District and subsequent razing of the purchased homes. The evidence at trial showed that almost all of the dislocated black families were relocated in the Masten District area, which exacerbated the segregated housing conditions (*See* map 5, *supra*). The relocation was described in Buffalo's official Community Renewal Program, quoted in the City's Model Cities grant application which was introduced into evidence:

> Although at the time there was a sufficient number of adequate housing units available, the relocation program failed to take into account the residential exclusion problem which restricted the movement of non-whites to the Masten and Ellicott Communities. This restriction, though unwritten and unstated, nevertheless, reduced the supply of housing units available to the non-white families displaced by the Ellicott Project to an unsatisfactory level. Thus, relocation of the Ellicott residents was accomplished by increasing the density of the remainder of the Ellicott Community and the lower Masten area mainly by virtue of illegal conversions of single and two, multi-family structures and by the

> doubling up of families in existing units. The impaction of these two areas in turn led to the speeding up of the processes of blight formation in the remainder of the Ellicott and Masten areas.
> (PX 260, pt. III, at 25, 26).

At trial, plaintiffs called as a witness Martin Sloan, General Counsel of the National Committee Against Discrimination in Housing, Inc. Mr. Sloan, who has extensive experience in Government agencies dealing with segregation in housing, such as the United States Commission on Civil Rights and the Home Financing Agency, was asked at trial whether he had an opinion as to how long it would take to alleviate the results of the discriminatory practices and policies followed by the Federal Government. Mr. Sloan's answer appears to be equally applicable to the discriminatory practices of BMHA, the City, and the private real estate industry:

> Well, it depends. If the federal agencies could turn around 180 degrees, by that I mean match the zeal, with which they carried on the discriminatory policies in the '30's and '40's, with a similar enthusiasm in carrying out equal housing opportunities and obligations, I would estimate two to three generations. At the rate they are going now, which is essentially a passive attitude toward their enforcement responsibilities, a much, much longer time. I couldn't estimate at all.
> (Record, Vol. VI, at 47).

[145] 2. THE RELEVANCY OF HOUSING SEGREGATION

The State and City defendants cite *Milliken v. Bradley,* 418 U.S. 717 (1974), as authority for the proposition that, in a case such as this, housing evidence is not relevant. In *Milliken,* a school desegregation suit involving the public schools of

Detroit, the Court of Appeals, in affirming the district court's decision that the defendants were guilty of segregative actions, had this to say about the housing evidence introduced at trial:

> This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation 484 F.2d 215, 242 (6th Cir. 1973).

The Supreme Court took note of this in its decision:

> Accordingly, in its present posture, the case does not present any question concerning possible state housing violations. *Milliken, supra,* 418 U.S. at 728 n. 7.

It cannot be said that either the Court of Appeals or the Supreme Court held the housing evidence inadmissible or irrelevant. The only certainty is that neither court relied on the housing testimony. Because of the defendants' primary reliance on the residential composition of Buffalo as a defense to this action, we feel it necessary and appropriate to express our findings on the housing evidence. It is too facile an argument to say that since this is a school desegregation suit, housing evidence is necessarily irrelevant. If the school suits have shown anything, they have demonstrated convincingly, in the words of Judge Weinstein, that

> [h]ousing and school patterns feed on each other. The segregated schools discourage middle class whites from moving into the area and the segregated housing patterns lead to segregated schools.

Hart v. Community School Board, supra, 383 F.Supp. at 706.[67]

In *United States v. School District of Omaha, supra,* 521 F.2d 530 (8th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3280 (Nov. 11, 1975), the court stated in a footnote:

> In light of the conclusive evidence of intentional segregative practices by the school district, we have not addressed ourselves to the appellants' contention that the public and private racial discrimination in housing provides an alternate ground for ordering all-out school integration. However, we do subscribe to the Fourth Circuit's reasoning:
>
> > . . . If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. . . .
>
> *Brewer v. School Board of City of Norfolk, Va.*, 397 F.2d 37, 41-42 (4th Cir. 1968) (*en banc*).
>
> 521 F.2d at 537 n. 11.

The evidence proves that the residential segregation in Buffalo was caused, in substantial part, by the policies and practices of the Federal Government, the BMHA, the private real estate industry and the Common Council of the City of Buffalo. The citizens of Buffalo, both black and white, and particularly the public school children, have been affected by the legacies of these actions, stretching back over many generations, which have contributed to a wall of misunderstanding.

The City defendants cannot use the residential segregation as a defense because, as the evidence demonstrates, they helped to cause the residential segregation through the Ellicott Relocation Program. The Common Council's portable classroom ordinance, discussed in section IV-F of this

opinion, *supra,* and the Board's districting of Woodlawn Junior High School, discussed in section IV-B of this opinion, *supra,* are examples of how the City defendants attempted to sustain and prolong the racial separation in schools that residential segregation encourages. But, even had the City defendants not actually contributed to residential segregation, to allow them to hind behind a condition they have long been aware of, that they have the authority to alleviate and that they once, in the City's Model Cities application, committed themselves to rectify, would be untenable.

Given the purposeful residential segregation in the City of Buffalo, the School Board's "neighborhood school policy" was not, and could not be, racially neutral. The Board's continued reliance on it fostered and maintained school segregation. As the district court in *Oliver v. Kalamazoo Board of Education, supra,* 368 F.Supp. 143 (W.D.Mich. 1973), stated:

> The school board should not be heard to plead that its neighborhood school policy was racially neutral when in fact "state action under the color of law" produced or helped to produce the segregated neighborhoods in the first place.
>
> 368 F.Supp. at 183.

The Fifth Circuit has noted that "[w]hen the segregated housing patterns are the result of 'state action', we are faced with *double* discrimination." *United States v. Texas Education Agency,* 467 F.2d 848, 863-64, n. 22 (5th Cir. 1972) (emphasis in original), motion to clarify opinion denied, 470 F.2d 1001 (5th Cir. 1973) *(en banc).* And the district court in *Morgan v. Hennigan, supra,* 379 F.Supp. 410 (D. Mass. 1974), ruled that "when school officials have followed for at least a decade a persistent course of conduct which intentionally incorporated residential segregation into the system's schools, that conduct is unconstitutional." 379 F.Supp. at 470.

This court cannot allow the Common Council and the Board to avoid liability by pointing the finger at each other. As the record reveals, neither has taken adequate steps within the ambit of their own authority to cure segregative situations in the community, and in fact both have taken some steps which have caused the segregation in the schools and in the community at large to continue.

Although the State Commissioner of Education and Board of Regents cannot be held directly responsible for housing segregation, they cannot use the unconstitutional actions of others to excuse their own failure to act, because, in the final analysis, the State defendants are responsible for education in New York.

The court finds, therefore, that the defense of residential segregation, like the "racially neutral" neighborhood school policy defense to which it is intimately related, is essentially a smokescreen. Furthermore, the court finds that the City defendants' past action and inaction which have, to a substantial degree, caused, exacerbated or maintained the segregated housing conditions, are separate and independent alternative grounds for holding them constitutionally liable for the segregated condition of the schools in Buffalo.

[152] *ORDER*

It is the finding of this court that the Board of Education, the Superintendent of Schools, the Commissioner of Education, and the Board of Regents have violated the plaintiffs' fourteenth amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system. Defendants, their successors and their agents are therefore enjoined from taking any further action in violation of plaintiffs' rights under the Constitution.

The court and the parties must now prepare to deal with phase two of this lawsuit—the remedy that is to be devised to end the unconstitutional segregation in the public schools of Buffalo. There are several preliminary considerations that all parties should keep in mind as the remedy is hammered out.

This court is not, and does not want to be, a school administrator. It does not have the specialized training, the knowledge or the experience that belong to the defendants. The limited nature of the court's function has been clearly delineated by the Supreme Court:

> Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. *The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default.*
> *Milliken v. Bradley, supra,* 418 U.S. 717, 809 (1974). (Marshall, J., dissenting) (emphasis added).

It is, therefore, the responsibility of the defendants to come forward with a plan that comports with the Constitution. The problems presented are difficult and will require rigorous effort to overcome, but overcome them the defendants must. The court is, of course, aware that both the Commissioner and the Board have already worked out plans on their own, under the Commissioner's impetus, but whether or not such plans will pass constitutional muster is not to be guessed at.

There are many diverse factors and influences that must necessarily be considered by the defendants, but this court's sole

> objective in dealing with the issues presented by [this case] is to see that school authorities exclude no pupil of

> a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.
> *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 23 (1971).

Acknowledging the complexity of these cases, the Supreme Court has set only one guideline: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*". *Green v. County School Board,* 391 U.S. 430, 439 (1968) (emphasis in the original).

Therefore, it is ordered that the City and the State defendants prepare plans to desegregate the BPSS. The proposed plans must encompass the staff segregation as well as the student segregation.

The Supreme Court, in *Milliken v. Bradley,* has stated:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race.
> *Milliken v. Bradley, supra,* 418 U.S. 717, 744-745 (1974).

On the present state of the record, there does not appear to be any basis for the court to order a metropolitan-wide remedy. However, it should be noted that *Milliken* does not prevent the State from itself devising and implementing a metro response to what is essentially a metropolitan problem. Nor does *Milliken* prevent a plan that would encompass the metropolitan areas on a voluntary basis, and the State defendants shall consider this in their plan.

All parties are directed to appear on Wednesday, May 19, 1976 at 2:00 p.m. The individual defendants and witnesses are not required to be present. But all attorneys shall be accompanied by representatives of the agency defendants who are acquainted with the problems of preparing a plan. The timetable for submission of the plan and other problems will be discussed.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: April 30, 1976

FOOTNOTES

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[1] 42 U.S.C. § 1983, entitled, Civil Action for Deprivation of Rights, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] The pertinent section of the fourteenth amendment reads as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[3] Plaintiffs' complaint cites 28 U.S.C. § 2201 as a jurisdictional basis. This section does not confer jurisdiction on a court where it would not otherwise exist, but merely provides the court with remedial powers. *See Nickerson v. United States*, 513 F.2d 31, 33 (1st Cir. 1975); *Kinsella v. Board of Education of Central School District No. 7*, 402 F.Supp. 1155, 1157 (W.D.N.Y. 1975).

[4] Stipulated material will be referred to throughout the text by reference to the numbered stipulation, for example (S-No. . . . .).

[5] As Judge Gurfein has noted with considerable understatement, most people are "as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor." *Hart v. Community School Board of Education*, 512 F.2d 37, 50 (2d Cir. 1975).

[6] Exhibits will be referred to as PX No. (Plaintiffs') and DX No. (Defendants').

[7] N. Y. Educ. Law § 3201 (McKinney's 1970).

[8] For the first decade or so after *Brown*, all school desegregation cases concerned southern schools. This case is one of many that have been brought in northern and western cities, such as Denver, Detroit and Boston. For an extensive list of the northern and western city school desegregation suits that have occurred, *see United States v. School District of Omaha*, 521 F.2d 530, 535, n. 7 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3280.

[9] There was some discussion at trial about exactly how "segregated" or "integrated" are to be defined. Absolute separation of the races need not be proved to show "segregated" conditions. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). Nor does the court need to set a precise numerical ratio to indicate what it considers segregated or integrated schools. Suffice it to say that substantial separation of the races amounts to "segregation" of the races. *See* 20 U.S.C. § 1720(c). Throughout this opinion, the terms "imbalance," "segregated," "predominantly majority" or "predominantly minority" are used interchangeably and without a precise mathematical connotation.

The question of whether different minority groups should be considered separately in a desegregation suit arose in *Keyes, supra*. The Supreme Court there ruled that blacks and hispanic Americans should be considered together when defining a "segregated" school. 413 U.S. at 197-98. For the BPSS, this distinction is not of significant dimensions, since as of October 1973 Spanish-surnamed students comprised only 3.1%, American Indians .8%, and oriental students .1% of the student population (PX 6, at 6). Unless otherwise noted, minority population figures include all four of these groups.

[10] The court notes the debate, both in the legal and in the public arenas, over the significance between *de jure* and *de facto* segregation. Since the plaintiffs in *Keyes* pleaded and proved *de jure* segregation, the Supreme Court was not forced to decide whether merely proof of *de facto* segregation constitutes cognizable legal wrong. *Keyes, supra*, 413 U.S. at 198. Justice Douglas nevertheless urged that ". . . it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies." *Keyes, supra*, 413 U.S. at 216 (Justice Douglas concurring). Justice Powell argued that the distinction had slowed the process of integration in the country at large and that it should now be abandoned. *Keyes, supra*, 413 U.S. at 217-236. He quoted Senator Abraham Ribicoff:

> Somehow residential segregation in the North was accidental or *de facto* and that made it better than the legally supported *de jure* segregation of the South. It was a hard distinction for black children in totally segregated schools in the North to understand, but it allowed us to avoid the problem. 118 Cong.Rec. 5455 (1972).
>
> *Keyes, supra*, 413 U.S. at 219, n. 5.

See also Brief for American Jewish Committee as *Amicus Curiae* at 6-13.

Our circuit adheres to the *de jure/de facto* distinction, *Hart v. Community School Bd. of Educ.*, 512 F.2d 37, 49 (2d Cir. 1975), and since plaintiffs have alleged *de jure* segregation, this court need not enter this debate.

[11] The Supreme Court further amplified the defendants' burden with this comment:

> This is not to say, however, that the *prima facie* case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did.
>
> *Keyes, supra*, 413 U.S. at 211.

[12] *Buffalo's Population 1900-1970:*

1900	352,387
1910	423,715
1920	506,775
1930	573,076
1940	575,901
1950	580,132
1960	532,759
1970	462,768

[PX 263, at 5 (citing U.S. Census Reports, 1900-1970)].

[15] Although complete racial population statistics are not available to the court for the years before 1960, the evidence at trial indicated that the black population in Buffalo grew as follows.

Black Population in Buffalo

1910	1,773
1930	13,000
1940	17,500
1943	25,656
1946	30,000

SOURCE: PX 229, at 1.It was estimated that three out of five new citizens coming to Buffalo during the war years were black. *Id.*

[16] *See* APPENDIX.

[16a] Several factors have been cited to explain the disproportion between the percentage of the black population in the City as a whole and the percentage of black population in the public schools, a phenomenon that is not unique to the BPSS. Among the factors are a higher black birth rate, the suburban exodus of whites, and the disproportionately high enrollment of whites in private and parochial schools. *See* Farley, *Residential Segregation And Its Implications For School Integration*, 39 Law and Contemporary Problems 164, 169-174 (1975).

[17] This phenomenon is common to many cities. *Id.* at 172.

[18] *ELEMENTARY SCHOOL GROWTH & DECLINE*

	Minority	*Majority*	*Total*
Jan. 66	17,756 (35.9%)	31,461 (64.1%)	49,217
Oct. 73	17,231 (45.5%)	20,671 (54.5%)	37,902

SOURCE: PX 6, at 19. This exhibit is the Ethnic Census of the Buffalo Public Schools 1973-74. The above figures are from page 19. Figures at page 7 of the same exhibit are slightly different.

ELEMENTARY SCHOOLS GROWING: 22, 27, 32 (Build Academy), 34, 44, 62, 67, 70, 82 and 86.

ELEMENTARY SCHOOLS DECLINING: 1, 3, 4, 6, 8, 9, 11, 12, 16, 17, 18, 19, 21, 23, 26, 28, 29, 30, 31, 33, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 51, 52, 53, 54, 56, 57, 59, 60, 61, 63, 64, 65, 66, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 85, 88, 90, 93.

Id., at 13-19.

[18a] This suit was tried in October 1974. The most recent figures in evidence at trial on schools, students and staff in the BPSS were for the 1973-1974 school year. (PX 6).

[17] Included in the 77 elementary schools are four special schools—24, 35, 50 and 84. There are also three other special schools with small enrollments that are not included in these figures. They are the Child Care Center, Immaculate Heart of Mary Home, and St. Augustine's.

[18] N.Y.Educ. Law § 3201 (McKinney's 1970).

[19] These examples assume that the children would attend academic high schools. If a child chooses to attend a vocational-technical high school, he can choose any vocational-technical school in the city. *See* section IV-D of this opinion, *infra*.

[20] Like all rules, there are exceptions. The principal exception that developed over the last decade was the voluntary integration program under which inner-city students could attend predominantly white peripheral schools. *See* Record, vol. VII, at 108-111. An example of this is West Hertel Middle School, where the minority students, comprising 28% of the student body, are primarily from the inner-city schools. There are other exceptions, also. *See* discussion in section IV-C of this opinion, *infra*.

[21] The word "district" in this sense refers to an attendance zone for a particular school, and does not indicate a complete school system, as in BPSS or Central School District No. 1.

[22] The hardship category apparently includes physical and emotional problems, harassment and social adjustment. *See* page 58, *infra*.

[23] An optional area is unique in that a student living there can attend the school in whose zone he lives, or another school. The "optional" school's district is usually contiguous to his normal school's district. *See* section IV-C-2 of this opinion, *infra*.

[24] This area, to the east of Main Street, was bounded by East Ferry Street, Michigan Avenue, Virginia Street and Jefferson Avenue.

[25] The Board's Director of School Attendance testified at a pre-trial deposition, offered into evidence at trial, as follows:

> Now, in the East High School District a lot of the white children used to take Polish because in the East High School District it is predominantly a Polish area, it was a Polish community, and they used to come down here and ask for Polish, and we used to allow them to go to maybe South Park or Kensington High School, . . .
> (PX 296, at 13).

[26] East High School enrollment was estimated to be in the range of 80% black in the United States Civil Rights Commission Report in 1963 (PX 10, at 35).

[27] In their attempt to show that East High School is "an all black school in an all black neighborhood" (Post-trial Brief for City Defendants, at 25), the City defendants called Mr. Anthony Girard who testified about the census tracts comprising the East High attendance zone (Record, vol. VIII, at 8-18). He listed fourteen census tracts, and then explained their racial composition. All but two of these tracts, listed in DX 9, are overwhelmingly black, and the import of his testimony was that the East High district is overwhelmingly black. The court notes that certain census tracts, which are overwhelmingly white, that are also contained in part in the East High district, were left out of DX 9 and were not mentioned in Mr. Girard's testimony. *See* PX 289, 290, 291 (census tracts 16, 24, 28, 29).

[28] The Department of Health, Education and Welfare's Preliminary Compliance Review of the BPSS, PX 264, at 690-691, indicates that even by 1960 East was the black academic high school in Buffalo, as the following figures show:

East	—	52.4% minority
Bennett	—	12.8% minority
Grover Cleveland	—	10.5% minority
Kensington	—	.3% minority
Lafayette	—	18.2% minority
Riverside	—	.7% minority
South Park	—	2.8% minority

[29] In June 1973, the Board of Education undertook a survey to discover where East district high school students were attending school (DX 12).

[30] The Board of Education did take some of these East district students to court in order to force them to attend school (Record, vol. VIII, at 37-40).

[31] *See* section IV-H of this opinion, *infra*.

[32] The area west of Main Street has traditionally been predominantly white.

[33] Staff members of the United States Commission on Civil Rights visited Buffalo to examine the BPSS in preparation for the staff report published in 1963. Among the individuals that were interviewed was Superintendent Manch. It was during an interview that Manch made this statement.

[34] Letter to Mr. Raphael DuBard, President of the Buffalo Branch of the NAACP, as quoted in PX 10, at 72-74.

Woodlawn Junior High's enrollment was 99% non-white when the school first opened in 1964. In October 1973, it was 99.6% minority [S-24(b); PX 6, at 21].

[36] The junior high schools and the years in which they were built are listed below.

Genesee-Humboldt	1961
Fillmore	1962
Clinton	1963
Woodlawn	1964
Southside	1966

Fillmore was changed to a middle school in 1967.

[37] Two interoffice memoranda from Board files were put in evidence that indicated that certain optional areas were instituted to promote integration (PX 42, 43). The Board did not push this position at trial, and we consider these memos' explanation of the optional areas to be self-serving and inaccurate.

[38] Other courts have found transfer and optional areas policies having segregative effect to be evidence of segregative intent. *See United States v. School District of Omaha*, 521 F.2d 530, 540 n. 19, 542 n. 23 (8th Cir. 1975).

[39] Each of the vocational-technical high schools specialize in particular areas. The following is a non-comprehensive list.

Burgard	—	automotive and airplane mechanics.
Emerson	—	plumbing and carpentry.
Fosdick Masten	—	cosmetology and health sciences.
Hutchinson-Central Technical	—	advanced science and mathematics.
McKinley	—	graphic arts.
Seneca	—	food training.

(Record, vol. II, at 123-25).

[40] The court could find no reference in the trial record as to whether the other vocational-technical schools are all male or mixed. The court assumes that young women do attend these schools.

[41] Mr. Reville testified as follows:

> A. . . . [I]t is my opinion that,—although I think the staff should be integrated and we have an affirmative policy of integrating staffs, given the racial composition of the schools as it is now, I believe that there ought to be black principals in predominantly black schools and there ought to be black teachers in predominantly black schools. This opinion is not only held by me, but most black teachers and most black principals, and I would say most of the black community because they exert a tremendous amount of pressure on me to assign these principals and teachers to predominantly black schools.
>
> Q. This is in spite of the policy of the Board to integrate?

A. That's correct, and I feel we have made some headway in the policy, but if I were asked what I felt, do I believe a black principal should be in a predominantly black school, I would have to say again, given the racial composition of our schools now, I think black students need black principals and black teachers for role models and these black teachers and black principals are very important in the community because of their knowledge of the community and their rapport with the students and again my experience with black parents, black community groups, black principals and teachers and black Board members, the way, I think they are almost unanimous in agreeing with me on that particular point, so we are doing something we don't completely agree with."
(Record, vol. VII, at 167-169).

[42] The constitutionality and/or legality of N.Y. Educ. Law, § 2573 (McKinney's 1970), which has allegedly hampered the Board in its attempts to attract young minority teachers, is not before the court at this time. § 2573 is being contested in this court in another suit, *Build of Buffalo v. Board of Education*, Civ-74-558.

[43] Until July 1, 1974, the Board members were appointed by the Mayor, N.Y.Educ. Law § 2553(3) (McKinney's 1970), subject to confirmation by the Common Council. Since that time, members have been elected to their posts. N.Y.Educ. Law, § 2553(10) (McKinney's Supp. 1976).

[44] The Board of Education must submit a budget each year for the Common Council's approval. The Common Council appropriates money for the Board of Education in the City budget, just like any other City department. N.Y.Educ. Law § 2576(4) (McKinney's 1970).

State monies are apportioned to school districts through a complicated formula based on student attendance within the individual school systems. N.Y.Educ. Law §§ 3602, 3602a (McKinney's Supp. 1976). In addition, the State funnels funds appropriated by the Federal Government to the school districts of New York. N.Y. Educ. Law § 3713 (McKinney's 1970).

[45] N.Y.Const. art. XI, § 1 (1931) (McKinney's 1969) reads:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

[46] The statute states the Commissioner's powers in hyperbolic terms, for his decisions can be reviewed on the limited grounds of arbitrariness. *See Radford v. Gage*, 59 Misc.2d 948, 301 N.Y.S.2d 282 (Sup.Ct. 1969).

[47] The first racial census of the public schools in New York State had been ordered by the Commissioner of Education in late 1961 and was completed in 1962. This census only covered grades one to six (PX 10, at 10; PX 282, at 2).

[48] The Project 1990 Middle School Plan for Buffalo, published in March of 1970, stated:

> It would take 24 years to integrate the schools of Buffalo at the present rate of progress, even if the white-black proportions in the total school enrollment stay constant.
> (PX 270, at 25).

Commissioner Nyquist, in a report to the Board of Regents in 1973, stated:

> It has been the exception, rather than the rule, that districts have voluntarily implemented desegregation plans.
> (PX 298, at CW 7.3).

[49] One of the suggestions for Woodlawn Junior High School was that it be made into a "magnet" school. The magnet concept involved making the school's curriculum so attractive that it would draw students from all areas of the city (PX 278, at 12).

[50] As the court understands the "educational park" concept, one large area consisting of a complex of buildings would house school facilities ranging from fifth grade through community college and would provide a diverse and enriching educational opportunity. The hope was that such an educational park would draw both city and suburban students (PX 270, at 8-10).

[51] The incoming inner-city students would not be resegregated at the receiving school by containing them in one large group in the portable classrooms. The portables merely increased the total capacity of each school.

[52] Section 201, Chapter XII of the City Ordinances, as amended June 11, 1968, is as follows (The amended portion is underlined):

> Section 201. Schools, special restrictions and alternate requirements. Notwithstanding any other provisions of this chapter regulating the classification, design, construction or location of buildings or structures, when there presently exists on any site a building or buildings used and occupied for school classrooms or other school purposes, no additional buildings or structures shall be erected or placed on said site unless the additional building or structure is of the same type of construction as the main building located thereon.
>
> Subject to the foregoing limitation, it shall be lawful to erect in this city schools and colleges, including the auditoriums and gymnasiums connected therewith, designed, constructed and used in the manner set forth herein, any other provision of this chapter to the contrary notwithstanding. This section shall only apply to such buildings or structures which do not exceed two stories in height; and this section may only take precedence over other applicable provisions.

[54] Commissioner Nyquist stated at a press conference in February of 1972 that, "[i]f you carried out that plan [the 4-4-4]. . . . we wouldn't be here today." (PX 105, at 6).

[55] Although twelve middle schools had originally been planned, it was later decided that six larger middle schools would be a more feasible idea (Record, vol. I, at 181).

[56] Long before the adoption in 1968 of the 4-4-4 plan by the Board of Education, the schools in Buffalo were on a two tier K to 8 and 9 to 12 system. In the early 1960's the system was in a transitional state, moving towards a three tier system, which would involve grades 1 to 6 in the elementary schools, grades 7 to 9 in junior high schools, and grades 10 to 12 in high schools (PX 10, at 5). The junior high school system never reached its full implementation and, at the time the 4-4-4 plan was approved by the Board, only 5 junior high schools existed. *See* n. 36, *supra*.

[57] According to various newspaper articles submitted into evidence, numerous civic groups expressed their opposition to the Council's refusal to fund the West Hertel Middle School, including the Buffalo Area Chamber of Commerce, the Rotary Club of Buffalo, the United Jewish Federation of Buffalo, Inc., the Buffalo Elementary and Secondary Principals and Assistant Principals Associations, the Buffalo Branch Inc. of the American Association of University Women, the Buffalo Public School Administrators Association, and the Building Trades Council of Buffalo & Vicinity (AFL-CIO) (PX 164).

[58] Commissioner Nyquist at this time was the acting Commissioner of Education.

[59] For example, the Board at one point reported that in September 1970 Bennett High School was to be redistricted to improve racial balance. The improvement in the minority enrollment at Lafayette High School was approximately 1.3% (to about 30%), and in the enrollment at Grover Cleveland High School, approximately 2.2% (to about 14.6%) (PX 278, at 22).

[60] One Board member, at a February 1, 1972 Board meeting concerning the Commissioner's order, stated: "I suggest that we treat the Commissioner respectfully but as an adversary." [PX 105(a), at 95].

[61] No action has been taken on this report (S-108).

[62] In a press conference in February of 1972, the Commissioner was questioned about possible alternatives if the Board failed to agree on a desegregation plan as he had ordered. Mr. Nyquist stated:

> Well I hope it won't come to that. I said to the Board this morning, got the same question, the Board is divided. I mean there's some difference of opinion on the Board as you probably know. I was asked that question and I said I'd jump off that bridge when I came to it because we have no precedent in this State, not to my knowledge, where a Board has refused to go along with a racial integration plan or a judicial decision of the Commissioner unless it was brought into the courts. There are two remedies in the law, and you can read the law as well as I can, when a Board—see a school district or school board is an extension of the State. Education is a state function and when a Board refuses to carry out educational policies the Board of Regents or the Commissioner of Education, *the two remedies that are specifically stated are the withholding of state aid and the initiation of proceedings to remove the Board*. And I hope we don't have to come to that.
> (PX 105) (emphasis added).

[63] The Board president had written the Deputy Commissioner in January of 1973. Shortly thereafter, another Board member wrote Mr. Sheldon and said that the

> . . . letter is phrased in terms of bussing, but to be realistic what he is saying to you is that the Board majority, as presently constituted, has no interest in talking about school desegregation regardless of the manner in which it might be accomplished.
> (PX 268).

[64] A show cause order was finally served in January 1975. As of April 10, 1975, the hearing on this order (originally scheduled for February 14, 1975) had been indefinitely postponed (Plaintiffs' Post-Trial Reply Brief at 5, filed April 10, 1975).

[65] N.Y. Educ. Law § 101 (McKinney's 1969) states in pertinent part:

> The regents also may appoint and, at pleasure, remove a deputy commissioner of education, who shall perform such duties as the regents may assign him by rule and who, *in the absence or disability of the commissioner* or when a vacancy exists in the office of commissioner, *shall exercise and perform the functions, powers and duties conferred or imposed on the commissioner by this chapter.*
> (emphasis added).

See Ex parte Anderson, 125 N.Y.S.2d 701, 282 App.Div.2d 993, *leave to appeal denied*, 128 N.Y.S.2d 581, 283 App.Div.2d 748 (3rd Dept. 1954).

[66] More recent figures on housing were not admitted into evidence. It should be noted, however, that housing patterns are not changed overnight. *See* Testimony of Martin Sloan, Record, vol. VI, at 47, quoted in section IV-H(4) of this opinion, *infra*.

[66] It was not only in the sale and purchase of real estate that black citizens ran into discrimination. Testimony at trial indicated that rental housing in Buffalo is comprised mainly of owner-occupied two-family dwelling units (Record, vol. V, at 111-112). Such housing is specifically exempted from coverage by Federal, State and City anti-discrimination housing laws. In 1967, the City of Buffalo applied to the Federal Government for a Model Cities grant. In the application, three barriers to open housing facing citizens in the model neighborhood area were detailed: short supply of rental housing, limited incomes of citizens in this area of the city, and discrimination in housing (PX 260, pt. III, at 25). The application stated a number of goals the City would attempt to reach, including the removal of "all barriers to unrestricted, free and equal access to all Buffalo area housing." (*Id.*, at 27). Among the approaches that the City specifically pledged would be adopted to achieve the open housing goal was "[t]he provision of total-coverage fair housing legislation together with machinery for vigorous enforcement." (*Id.*, at 28). A resolution that directed the Corporation Counsel to draw up a total coverage fair housing law was introduced in the Common Council by Councilman Johnson in 1968 (PX 171). But, notwithstanding the City's pledge in its Model Cities application, no open housing legislation was ever passed (Record, vol. IV, at 114-115).

[67] Whether residential segregation is due to State action or private action, or even if it merely is due to fortuitous external factors, the possible consequence is that

> [b]y rigidly adhering to geographic criteria over a long period of time the school board assures the parent who does not want his children to go to school with Negroes that this desire can be fulfilled by moving into a white neighborhood. The invasion-succession sequence is also foritified by the use of geographic criteria since it assures the white parent that if he moves out of the neighborhood "invaded" by the Negro, he will be leaving the Negro behind.
>
> Fiss, *Racial Imbalance In The Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564, 587-588 (1965).

APPENDIX

ERIE COUNTY SCHOOL DISTRICTS RACIAL PERCENTAGES

District	*Total Enrollment*	*Black*	*Spanish Surnamed Americans*	*American Indian & Oriental*	*Other*
Alden	1,492	0.2	0.2	0.1	99.5
Williamsville	11,660	0.9	0.1	0.8	98.2
Sweet Home	7,500	1.9	0.1	0.4	97.6
Eggertsville	1,115	1.3	0.9	2.3	95.5
Snyder	1,331	0.9	---	1.2	97.9
Amherst CHS	2,842	0.6	0.4	0.5	98.5
East Aurora	3,439	0.2	0.2	0.1	99.6
Buffalo	64,324	41.0	2.9	1.0	55.1
Cheektowaga	3,872	0.3	---	---	99.7
Maryvale	7,440	0.2	---	0.1	99.7
Cleveland Hill	2 566	0.4	---	0.3	99.3
Depew	3,998	0.8	*	0.2	99.1
Sloan	2,994	*	*	---	99.8
Clarence	4,639	0.3	*	0.3	99.4
Griffith Institute	3,395	0.1	0.3	0.6	99.1
Eden	2,781	*	0.4	0.1	99.4
Iroquois	3,988	0.1	*	0.2	99.6
Lake Shore	4,273	1.3	0.8	0.4	97.5
Grand Island	4,314	1.5	0.1	0.5	97.9
Hamburg	6,112	0.1	0.1	---	99.7
Frontier	7,079	0.2	0.3	0.1	99.4
Holland	1,802	---	0.6	0.2	99.3
Lackawanna	5,473	16.3	5.2	0.1	78.5
Lancaster	6,980	0.4	---	0.2	99.4
Akron	2,045	0.6	---	6.7	92.7
North Collins	1,413	0.2	1.5	2.7	95.6
Orchard Park	5,557	0.5	0.2	0.1	99.2
Tonawanda	5,157	0.1	0.1	0.4	99.4
Kenmore	19,786	0.4	0.3	0.2	99.1
West Seneca	14,608	0.3	0.1	0.1	99.5
COUNTY TOTAL	215,613	13.0	1.1	0.6	85.3

(* - less than one percent)

SOURCE: DX 4; *See* Record, vol. X, at 68.

APPENDIX D

Order Clarifying the Court's April 30, 1976 Amended Order

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

In this court's April 30, 1976 decision in this case, which allowed the plaintiffs to amend their complaint to include individual members of the Board of Education and State Board of Regents, I quoted the recent Second Circuit opinion in *Monell v. Department of Social Services*, ... F.2d .... (2d Cir. 1976), slip opinion at 2420:

> There is no doubt that municipal and state officials, sued in their official capacities, are "persons" within the meaning of § 1983 when they are sued for injunctive or declaratory relief.

I also stated that the "[p]laintiffs have stipulated that they do not, and will not, seek attorneys fees from the defendants as private citizens in their individual capacities." Furthermore, I explained that had the individual Board members been named in the original complaint, the present defendants,

in their official capacities, would automatically have been substituted under Federal Rule of Civil Procedure 25(d)(1).

At the May 19, 1976 hearing in this case, the court noted some confusion about its April 30 order granting leave to amend the complaint to add individual Board members. There was still apprehension that Board members could be held liable in their individual capacities. In addition, eight Board of Regents members have filed notice to appeal, seeking, among other things, to overturn this court's April 30 order allowing them to be named as defendants in their individual and official capacities.

The court now clarifies its April 30, 1976 amending order. The individual members of both the Board of Regents and the Board of Education were added to the lawsuit in their official capacities only.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: June 10, 1976

APPENDIX E

Order Making Corrections in the Court's Decision

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

Since this court's decision in this case was filed April 30, 1976, several minor errors have come to the court's attention. Pursuant to Federal Rule of Civil Procedure 60(a), the court makes the following corrections.

1. On page 128 of the decision, the words "Common Council" were inadvertently omitted from the last sentence of the first paragraph. The beginning of the sentence is now amended to read:

> The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Common Council, the Commissioner of Education and the Board of Regents . . .

2. On page 152, the words "Common Council" were also omitted from the first sentence on that page. The beginning of that sentence is amended to read:

Appendix E—Order Making Corrections in the Court's Decision.

> It is the finding of this court that the Board of Education, the Superintendent of Schools, the Common Council, the Commissioner of Education, and the Board of Regents . . .

3. On page 3, the word "for" in the second sentence of the second paragraph should have read "forth." The sentence is amended to read:

> The question presented—whether or not the defendants intentionally committed segregative acts affecting the Buffalo public schools—is one that calls forth the strongest of emotions.

4. On page 55, the verb "was" on the fifth line of the first full paragraph is amended to "were."

5. On page 143, the direction "*See* map 5, *supra*" is amended to read "*See* map 3, *supra.*"

6. In footnote 64, the citation to *Ex parte Anderson* is amended to read 125 N.Y.S.2d 701, 282 App. Div. 993, *leave to appeal denied*, 128 N.Y.S.2d 581, 283 App.Div. 748 (3rd Dept. 1954).

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: June 3, 1976

APPENDIX F

Proceedings Before Hon. John T. Curtin, July 9, 1976

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, Western District of New York, in Part I, United States Court House, Buffalo, New York, on July 9, 1976.

* * *

to seek the assistance of members of the business community.

Seventeen. All the parties are directed to begin the work of obtaining suitable community representatives from each school to assist in the monitoring of the plan as finally submitted.

Eighteen. In addition to the obligations already imposed on the State defendants, they are directed to come forth on October 15 with a detailed scheme of involving the suburban schools in the participation with the plan. In the intervening period, the Commissioner and his representatives are directed to meet with suburban school leaders to determine what school resources, staff, BOCES use or other school facilities may be used on a voluntary or other basis in order to assist in the integration effort in the Buffalo Schools. The Commissioner is to report on these meetings in detail to the Court, including information on minority enrollment in each suburban school district, the availability of classroom spaces, and the cooperative use of facilities by the Buffalo Public School System. In particular, the Commissioner shall discuss with the neighboring School Boards and the Superintendents the provisions of Title 20 of the United States Code, Section 1605.

Nineteen. The Board and State defendants are directed to meet with representatives of the other colleges and universities in the area to endeavor to formulate a plan for their participation in the integration program. The community should be grateful to Canisius College for its welcome offer of assistance in the School 17 program. It appears to the Court that the resources of the State University, State Teachers College and other colleges and universities in the area should be solicited and the Court believes that many of these institutions will be ready and willing to offer their space, time and resources, both personnel and physical, to this problem of education. The Court directs the parties to solicit the time and advice of community leaders, business, labor, professional, Bar Association, in this serious and difficult problem. The results of these meetings shall be incorporated into the plan.

Twenty. Because of the modifications of the Buffalo Plan directed in this order, it may be necessary for the Board to adjust some of its plans for the coming school year. The parties shall meet and discuss the difficulties and prepare a joint order to be submitted to the Court for signature on August 17. As far as possible, the problems of the individual student must be addressed. Mere transfer for transfer sake alone does not help the student or the integration of the schools. If it appears apparent that the transfer will be for a one year period only and not in keeping with an overall plan of integration, then if possible, the transfer should be avoided.

Twenty-one. The Court notes that the members of the Common Council are defendants in this suit and have a responsibility to remedy the prior discrimination found by the Court. That body along with other

* * *

APPENDIX G

Decision and Order Dated December 10, 1976 Denying State Defendant Motion to Reconsider

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325.

APPEARANCES:

RICHARD F. GRIFFIN, ESQ., Buffalo, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General, State of New York (JEAN M. COON, ESQ., of Counsel), Albany, New York, for defendants Commissioner of Education and Board of Regents of the State of New York.

LINDEN AND DEUTSCH (DAVID BLASBEND, ESQ., of Counsel), New York, New York, for defendant Individual Members of Board of Regents, Martin C. Barell, Willard A. Genrich, Emlyn I. Griffith, Joseph C. Indelicato, William Jovanovich, Mary Alice Kendall, Genevieve S. Klein & Louis E. Yavner.

On April 30, 1976 this court found that the public schools in Buffalo had been purposely segregated in violation of

plaintiffs' fourteenth amendment rights. *Arthur v. Nyquist,* 415 F. Supp. 904 (W.D.N.Y. 1976). Also filed that day was a decision allowing the plaintiffs in this case to amend their complaint to add the individual members of the State Board of Regents and the individual members of the Board of Education, in their official capacities, as parties-defendant.[1] 415 F.Supp., at 972.

Eight individual Regents represented by private counsel filed notice of appeal on June 1, 1976 from that part of this court's decision that found the Regents to have violated plaintiff's fourteenth amendment rights and which enjoined them from further such violation, and from that part of the decision that granted plaintiffs' motion to add these individual Regents in their official capacities as parties-defendant.

On June 16, 1976 these same eight Regents asked this court to modify its April 30, 1976 decision to hold that no individual Regent, or the Board itself, was responsible in any manner for the segregation that characterizes the BPSS, to find that the individual Regents should not have been added as parties-defendant, and to dismiss the action as to those eight individual Regents. Because these defendants had filed a notice of appeal, this court was without jurisdiction to consider their motion. Then these Regents stipulated to remand the case for this court's consideration of this motion. In open court on August 17, 1976, the court heard the motion and denied it. This memorandum decision contains the court's reasons for the denial of the defendants' motions.

In granting the plaintiffs' motion to add the individual Regents in their official capacities, this court briefly examined the history of 42 U.S.C. § 1983 and the limited sub-

ject matter jurisdiction under that statute. Although many suits were apparently brought against school boards per se, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) [*see also* the district court decision at 243 F.Supp. 667 (W.D.N.C. 1965)], and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Supreme Court in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), and the Second Circuit in *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259 (2d Cir. 1976), have firmly established that a school board is not a person under § 1983. *See also Kornit v. Board of Education*, ... F.2d ...., Docket No. 75-7540 (2d Cir. Sept. 15, 1976).

Notwithstanding this strict construction of § 1983's subject matter jurisdiction requirements, when a plaintiff performs the requisite procedural formalities and sues the individual members of a school board, the suit then proceeds as if it were against the board as an entity. This makes logical and practical sense because the board only acts as a body. Furthermore, as this court has pointed out before, if only the actions of individual board members could be considered, and individuals held liable for them, corporate entities such as a school board could continually escape liability by changing their membership.

The court considered all the circumstances when it allowed plaintiffs to add the individual Regents in their official capacities. The Regents were ably represented from the beginning of this lawsuit; they first raised the *Kenosha* defense in their post trial briefs; and the individual Regents had full notice of the action. It seemed to the court at the time, and it still seems, that it would have been an injustice to dismiss the case against the Board of Regents and to refuse to allow the plaintiffs to amend their complaint to add the individual Regents in their official capacities only.

The Regents also contend that the court erred in finding them jointly liable with the City defendants and the Commissioner of Education for the segregation that permeates the BPSS. The Regents argue that they only make policy and that it is the Commissioner's duty to enforce the policy. Pointing to a provision of New York law that states:

> . . . [the Commissioner of Education's] decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. New York Education Law § 310 (McKinney's 1969).

the Regents contend that they are powerless to overturn or modify any action of Commissioner Nyquist. The Regents annexed to their motion papers an opinion by retired New York State Supreme Court Justice Howard T. Hogan which details the strong enforcement powers of the Commissioner, and the inability of the Regents to officially hear an appeal or modify the Commissioner's actions. In sum, the Regents claim that they did all they could within their defined and limited powers and that they should not be held liable for the segregation in the BPSS.

The Hogan treatise is not persuasive. Justice Hogan was asked by the Regents to prepare this article before this case was decided and it appears that the request was made to facilitate the passage of a new law that would give the Regents some statutory appeal power. Be that as it may, the Regents nowhere discuss the fact that the Commissioner serves at their pleasure. N. Y. Education Law § 303 (McKinney's 1969).[2] Ultimately, they do have control over him, and certainly their policy making power could have been utilized to affect the Buffalo situation.

Finally, noting that only one of these eight Regents was elected prior to the institution of this lawsuit, that four were named prior to trial and that three were named post trial, these eight Regents contend that intent to segregate cannot be imputed to officials elected subsequent to the acts or omissions alleged. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974). In that case, the plaintiffs argued that the Mayor of Philadelphia had discriminated in his discretionary appointments to a particular citizens board. The Supreme Court reversed the Court of Appeals decision which upheld the plaintiff's argument. The Court stated that the appellate court "erred in ordering prospective injunctive relief against the new Mayor in a case devoted exclusively to the *personal appointment policies* of his predecessor." 415 U.S. at 613 (emphasis added). In the course of the opinion, the Court noted:

> Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor.
> 415 U.S. at 622.

For this proposition, the Court cited *Spomer v. Littleton*, 414 U.S. 514 (1974), a case in which the plaintiff sought injunctive relief against a state's attorney. The defendant in *Spomer* was later replaced by the voters and his successor argued that the case should be dismissed against him. The Supreme Court stated:

> The wrongful conduct charged in the complaint is *personal* to [the original State's Attorney], despite the fact that he was also sued in his then capacity as State's Attorney. No charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged. . . .
> 414 U.S. at 521 (emphasis added, footnote omitted).

The Court remanded the case for a determination whether the plaintiff wanted to, and whether he should be allowed to, amend the complaint, since the new State's Attorney was never charged with any misconduct by the plaintiff.[3]

Neither of these cases stand for the proposition that the defendants claim. In this case, despite the procedural formalities that require that individual members of the Board be sued, we are dealing nonetheless with an entity and that entity's continuing actions and failures to act. In *Mayor* and *Spomer*, on the contrary, the Court was dealing with specific acts personal to specific individuals. In one case it was a mayor, in the other it was a state's attorney. Neither case involved a corporate body's actions.

For the reasons stated, the court denies the defendant Regents' motions.

After the eight individual Regents brought this motion, the Attorney General moved on behalf of the remaining Regents and the Commissioner of Education to join in this motion. For the reasons stated above, their motion is also denied.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: December 10, 1976

Appendix G—Decision and Order Dated December 10, 1976 Denying State Defendant Motion to Reconsider.

FOOTNOTES

[1] The April 30 decision spoke of adding the individual members of the Board of Education and the Board of Regents in their individual and official capacities. The court clarified its April 30 ruling on June 10, 1976, when it specifically stated that these Board members were added in their official capacities only.

[2] That the Regents possess ultimate control over the Commissioner is demonstrated by the recent firing of Commissioner Nyquist, effective June 1977. *See* N. Y. Times, Nov. 20, 1976, at 1, col. 1.

[3] The former State's Attorney was one of several defendants in the original complaint. The district court dismissed that part of the complaint requesting injunctive relief against him, but the Court of Appeals reversed. After the appellate court ruling, Spomer was elected the new State's Attorney. Spomer, relying on Supreme Court Rule 48(3), which is based on Federal Rule of Civil Procedure 25(d), and which automatically substitutes a succeeding official in his official capacity in proceedings pending when he takes office, petitioned the Supreme Court for review of the appellate decision. *Spomer v. Littleton, supra,* 414 U.S. at 520-521.

APPENDIX H

Order of Judge Curtin Rebriefing Austin

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

The court is aware that the recent Supreme Court comments and action in the Austin, Texas school case, *Austin Independent School District v. United States*, 45 U.S.L.W. 3413 (Dec. 12, 1976), in which the Court vacated the circuit court's order and remanded the case for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976), have provoked some discussion.

At this point, the impact of the Supreme Court's actions are unclear. Since every city is unique and the factual foundation of that case is different in many respects from this case, further study must be made to discover what effect will be felt on the Buffalo school case.

For the present, then, the parties are directed to follow the previous orders and guidelines of this court and the deadlines that have been set.

In order to assist the court, all parties are requested to analyze and brief the *Austin* case, and *Washington v. Davis, supra,* as these cases pertain to this case. For the convenience of the parties, a copy of Justice Powell's comments in the *Austin* case, as they are reported in the December 12, 1976 issue of United States Law Week, will be sent to each party with this order. The court directs that briefs be submitted on or before January 19, 1977.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: December 14, 1976

APPENDIX I

Decision and Order of the United States District Court for the Western District of New York Dated March 1, 1977

UNITED STATES DISTRICT COURT
Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325

APPEARANCES:

RICHARD F. GRIFFIN, ESQ., Buffalo, New York, and HERMAN SCHWARTZ, ESQ., Amherst, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (RUTH KESSLER TOCH, ESQ., Solicitor General, & JEAN M. COON, ESQ., Assistant Solicitor General, of Counsel), Albany, New York, and (EUGENE A. PANFIL, ESQ., Assistant Attorney General, Buffalo, New York, of Counsel), for the Commissioner of Education and the Board of Regents of the State of New York, defendants.

LINDEN AND DEUTSCH (DAVID BLASBAND, ESQ., of Counsel), New York, New York, for Individual Regents Barell, Indelicato, Genrich, Griffith, Klein, Jovanovich, Kendall & Yavner, defendants.

LESLIE G. FOSCHIO, Esq., Corporation Counsel of the City of Buffalo (ANTHONY GREGORY, ESQ., Assistant Corporation Counsel, and AUBREY McCUTCHEON, ESQ., Special Counsel, of Counsel), Buffalo, New York, for Mayor Stanley M. Makowski, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

In December 1976, after the Supreme Court vacated and remanded the Austin school case, *Austin Independent School District v. United States,* .... U.S. ...., 45 U.S.L.W. 3413 (Dec. 7, 1976), this court requested each of the parties to this school case to brief the *Austin* case and *Washington v. Davis,* 426 U.S. 229 (1976), the case that prompted the Supreme Court's action in *Austin*. Following this court's request, the

City defendants by motion asked this court to vacate its April 30, 1976 liability decision, *Arthur v. Nyquist*, 415 F.Supp. 904 (W.D.N.Y. 1976), or, in the alternative, to reconsider that decision in light of *Washington v. Davis* and *Austin*. The court has agreed to reconsider its decision.

The City defendants contend that *Washington v. Davis*, the *Austin* case, and the subsequently decided case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, ... U.S. ...., 45 U.S.L.W. 4073 (Jan. 11, 1977), all of which are post-April 30, 1976 cases, have changed the law this court relied on in its liability decision. The State defendants urge the same argument in their briefs. To determine the impact of these cases requires a close look at each.

I. *WASHINGTON v. DAVIS*

In *Washington v. Davis*, 426 U.S. 229 (1976), the plaintiffs allege that a test administered by the District of Columbia's Police Department to prospective police officers was a violation of their fifth amendment due process rights. The plaintiffs, two black men whose applications had been rejected, did not claim that the department intentionally discriminated against them through the use of the test, but merely charged that the test had "a highly discriminatory impact in screening out black applicants." 348 F.Supp. 15, 16 (D.D.C. 1972). On appeal, the circuit court reversed the district court and held that the disproportionate racial impact alone was sufficient to sustain plaintiff's claim of a constitutional wrong. 512 F.2d 956, 960 (D.C.Cir. 1975).

The Supreme Court's decision in *Washington*, overruling the circuit court, stated explicitly:

> [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. 426 U.S., at 239 (emphasis in original).

During the course of its opinion, the Court noted that school cases have adhered to the principle that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S., at 240. The Court cited with approval its 1973 decision in the Denver school case, *Keyes v. School District No. 1*, 413 U.S. 189, 205 (1973), in which the Court had stated that one of the essential elements of *de jure* segregation is "a current condition of segregation resulting from intentional state action."

II. *AUSTIN*

When the Supreme Court vacated the circuit court opinion in the *Austin* case, it remanded the case to the circuit court "for reconsideration in light of *Washington v. Davis*." 45 U.S.L.W. 3413 (Dec. 7, 1976). Some light was shed on the Court's thinking by the separate opinion of Justice Powell, concurred in by Chief Justice Burger and Justice Rehnquist, which stated:

> As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have erred by a readiness to impute to school officials a

segregative intent far more pervasive than the evidence justified.[1]

[1] Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, *e.g.*, United States v. Texas Education Agency, 467 F.2d 848, 865-869 (CA 5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools . . .

The *Austin* case has a long history. Filed in 1970, the suit alleged that the Austin Independent School District [AISD] discriminated against both black and Mexican-American students. With respect to the latter, however, the district court found that the Government did not prove intentional discrimination. On appeal, the circuit court, in an *en banc* decision, 467 F.2d 848 (5th Cir. 1972) [*Austin* I], reversed this finding as clearly erroneous. Among other things, the circuit court stated:

> The district court may have applied an erroneous legal standard . . .
>
> It is not necessary to prove discriminatory motive, purpose, or intent as a prerequisite to establishing an equal protection violation when discriminatory effect is present.
>
> 467 F.2d, at 864-865, n.25.

The case came back on appeal to the Fifth Circuit after the district court had adopted and put into effect the remedy proposal of the AISD. In the intervening years, the Supreme Court had decided the *Keyes* case, in which it specifically noted the intent requirement. The circuit court admitted that the

"cause and effect"[1] test previously applied in *Austin* I, which obviated any need for finding discriminatory intent, was supervened by *Keyes*. The court proceeded to find the defendants had intentionally discriminated against the plaintiffs. 532 F.2d 380, 390-392 (5th Cir. 1976) [*Austin* II]. However, it apparently is unclear to the Supreme Court, as evidenced by Justice Powell's words, *supra*, whether the Fifth Circuit made a proper finding of intent. During the course of his opinion, Judge Wisdom noted that Austin is a residentially segregated city, and that the "natural, foreseeable, and inevitable result of the AISD's student assignment policy," 532 F.2d, at 390, which is to assign a student to the school nearest his or her home, is a segregated school system in Austin. The inference of discriminatory intent, said the court, was inescapable. The reason for utilizing the "reasonable and foreseeable consequences" test is that "it is difficult—and often futile—to obtain direct evidence of [an] official's intentions." 532 F.2d, at 388.

Justice Stevens, in a concurring opinion in *Washington v. Davis, supra*, has made the same observation:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. *For normally the actor is presumed to have intended the natural consequences of his deeds.* This is particularly true in the case of governmental action which is frequently the product of compromise of collective decisionmaking, and of mixed motivation. . . .

> My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of [*Washington v. Davis*] might assume.
> 426 U.S., at 253-254.

III. *ARLINGTON*

In *Arlington*, a non-profit developer had arranged to buy a tract of land in a suburb of Chicago and build low and moderate income housing. The projected series of town houses, amounting to some 190 units, would occupy a fifteen-acre tract that had been zoned for single-family houses. The developer requested a zoning change to allow his multiple-family project to proceed and he was turned down.

Arlington, in the 1970 census, was recorded as having 64,000 residents of whom twenty-seven were black. The town house development was expected to be integrated, and the developer and several prospective black tenants sued various Arlington officials claiming that the refusal to rezone the land was a violation of their fourteenth amendment rights. After a trial, the district court ruled that the plaintiffs had not proved that defendants' actions were motivated by racial discrimination. Instead, the court found that the village officials acted "to protect property values and the integrity of the Village's zoning plan." 373 F.Supp. 208, 211 (N.D.Ill. 1974). The court noted that this particular parcel had been zoned for single-family use ever since 1959 when the zoning map was first drawn up.

On appeal, however, the circuit court, although it agreed that racial discrimination had not motivated the defendants, reversed because the refusal to rezone the tract had a racially disproportionate effect. 517 F.2d 409 (7th Cir. 1975). The Supreme Court, citing *Washington v. Davis*, stated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington, supra*, 45 U.S.L.W. at 4077.

As Justice Stevens did in *Washington v. Davis*, the *Arlington* Court went on to discuss at some length the inherent difficulty of imputing intent when the actions of a group of people are concerned.

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. . . . But racial discrimination is not just another competing consideration. . . .
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action . . . may provide an important starting point.
> *Arlington, supra*, 45 U.S.L.W. at 4077.

Since the district court had found, and the Court of Appeals had agreed, that no racially discriminatory intent was proved, the Supreme Court reversed the Court of Appeals.

IV. *THE INTENT REQUIREMENT*

Certainly the impact of *Washington v. Davis, Austin,* and *Arlington* is that there may be no finding of racial discrimination in violation of the Constitution without a finding of discriminatory intent. This much is uncontested by the parties. Furthermore, if this were the full import of these cases, no reconsideration of this court's decision would be warranted since the court made findings of the requisite discriminatory intent as to the Board of Education, the Common Council, the Superintendent of Schools, the Board of Regents and the Commissioner of Education. The critical question following these cases, however, and the point on which the defendants claim this court's findings are faulty, is the standard for intent.

Implicit in these recent cases, the defendants' argument goes, is a complete rejection of the "probable and foreseeable consequences" test as a measure of intent. This test, which has been utilized to varying degrees by a number of courts,[2] including the circuit court in *Austin* II, *supra,* was adopted in this circuit in the case of *Hart v. Community School Board,* 512 F.2d 37 (2d Cir. 1975). Since this court cited and relied on *Hart,* and since this court made use of this standard in its decision, the defendants argue that the findings of intent were improper.

V. *THE HART TEST*

In *Hart,* a school desegregation suit involving only one school, Mark Twain Junior High School in Brooklyn, New York, Judge Weinstein in his district court decision, 383 F.Supp. 699 (E.D.N.Y. 1974), made the somewhat unusual

finding that the defendants, although they had, among other things, changed feeder patterns, amended attendance zones and constructed a new junior high school with the "natural and foreseeable impact of . . . helping create severe racial imbalance," nevertheless found that the defendants did not desire Mark Twain to become segregated. 383 F.Supp., at 716, 721. Treating the case as an example of *de facto* segregation, Judge Weinstein went on to find a constitutional violation because school officials took steps they knew would enhance the segregation and refused to take steps to alleviate it. 383 F.Supp., at 755.

On appeal, the Community School Board urged that the district court had applied the wrong standard and that it could not charge the Board with segregating the school and at the same time declare it innocent of any racially discriminatory intent. The appeals court acknowledged that the district court's findings were "somewhat inconsistent," 512 F.2d, at 48, and disagreed that the evidence showed *de facto* segregation. The intent required for a finding of *de jure* segregation, the court ruled, "may be evidenced by the performance of acts, the foreseeable consequence of which is segregation." 512 F.2d, at 51.

The circuit court realized that this standard had not been given official, explicit approval by the Supreme Court, but, citing cases that indicated approval of an objective standard of intent,[3] it said:

> Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and

foreseeable consequence of causing educational segregation.
512 F.2d, at 50.

To the extent that the *Hart* standard suggested that mere cause and effect, mere analysis by way of a "reasonable and foreseeable consequences" test which amounts to a finding that disproportionate impact is sufficient to impose liability for school segregation under the fourteenth amendment, it is refuted by *Washington v. Davis* and *Arlington.*[4] This apparently is what the Supreme Court thought might have happened in *Austin* II. But this court does not read either *Washington v. Davis* or *Arlington* to prohibit the use of the foreseeable consequences test to analyze circumstantial evidence in evaluating the intent of defendants in school cases. At a minimum, "[t]he impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis*, 426 U.S., at 242—may provide an important starting point." *Arlington, supra,* 45 U.S.L.W. at 4077.

The Supreme Court has acknowledged repeatedly the necessity, and the difficulty, of inquiring into the motive behind objective acts. *See Arlington, supra,* 45 U.S.L.W. at 4077-4078; *Washington v. Davis, supra,* 426 U.S., at 253-254 (J. Stevens, concurring). *Washington v. Davis, Austin* and *Arlington* merely emphasize that the motive behind actions and inactions, and not the resultant impact alone, is determinative when a constitutional violation is alleged.

VI. *RECONSIDERATION*

Having completed this long analysis of what some considered a "semantic" argument before *Washington v. Davis* and *Arlington, see Hart, supra,* 512 F.2d, at 51, the court must now reconsider its opinion of April 30, 1976. The question on reconsideration is simply this—did this court find that the defendants intentionally acted and refused to act so as to segregate and maintain the segregated condition of the Buffalo Public School System, or did it find a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent.

The April 30, 1976 liability decision is detailed and extensive. The court cited and relied on the leading Supreme Court case of *Keyes v. School District No. 1, supra,* which requires that plaintiffs prove "purposeful or intentional segregative acts by the defendants." *Arthur v. Nyquist, supra,* 415 F.Supp., at 912. Following the command of *Keyes,* this court labored to conduct what the Supreme Court later called "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington, supra,* 45 U.S.L.W., at 4077. At the City defendants' request, the court has backtracked and reviewed its findings carefully. It is not necessary now to repeat at length all the evidence of purposeful intent contained in the April 30, 1976 decision, but a brief review should serve to put the findings in perspective. It should be emphasized that by citing here a few examples of the evidence produced at trial, the court is not indicating that the rest of the proof, explained in greater detail in the original decision, is no longer persuasive.

EAST HIGH—The plaintiffs proved at trial that the Board ignored its own curriculum policy, offering a special foreign language at a high school where sufficient student support existed, when it allowed large numbers of foreign language transfers out of East. The great proportion of transferring students were white. The Board was aware of the detrimental racial effect this was having on East, and no reason existed for ignoring or circumventing its own curriculum policy. This evidence, in addition to other proof on redistricting of East's district, was sufficient to find that the Board intended that white students be allowed to avoid East and that East become a black school.

WOODLAWN JUNIOR HIGH—This court found that the plaintiffs failed to prove racial intent in the siting of Woodlawn Junior High School. But when it came to the districting of that school, the question of intent was inescapable. There was overwhelming evidence, including the testimony of Board members, that the Board intended that Woodlawn be a black junior high.

TRANSFERS AND OPTIONAL AREAS—In *Arlington*, the Supreme Court noted that procedural and substantive departures from the norm are sometimes probative of racial intent. *Arlington, supra,* 45 U.S.L.W., at 4077. The plaintiffs' proof that some white students were allowed to transfer to avoid black schools for reasons that were inadequate under official Board policy, that others were allowed by individual principals to transfer instead of following normal procedure and applying to the Office of Pupil Personnel Services, and that some white students were able to avoid black schools because some predominantly white areas were made optional areas,

are examples of such procedural and substantive irregularities that can support a finding of invidious purpose. The court examined the Board's actions with respect to several elementary schools in particular, and found that the evidence on transfers and optional areas was sufficient to support a finding of discriminatory intent.

VOCATIONAL-TECHNICAL SCHOOLS—The Board admitted that its admissions policies at particular schools were discriminatory, so the question of intent did not arise.

STAFF—The assignment of minority staff and minority administrators to predominantly or all minority schools was admittedly done intentionally.

The finding on staff recruiting stands on different grounds. The plaintiffs' proof on this question consisted essentially of statistics showing that minority staff had not increased perceptibly, in percentage terms, in over ten years time. Standing alone, it is arguable whether this evidence meets the "stark pattern" test of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *See Arlington, supra,* 45 U.S.L.W., at 4077. But this is not simply a hiring discrimination suit, and the individual parts of a full spectrum school discrimination suit cannot be isolated from each other. *See Keyes, supra,* 413 U.S., at 207. The overall evidence of racial discrimination in other areas of the school system, and in particular the admitted assignment of black staff and administrators to predominantly or all minority schools, is sufficient to support a finding that the limitation on minority hiring was purposeful.

COMMON COUNCIL—The Common Council's actions to stop the use of portable classrooms against the express advice

of the Corporation Counsel and to hold up the construction of West Hertel Middle School were racially motivated. The Superintendent of the schools at the time believed this, and the evidence at trial allowed only that conclusion.

REGENTS AND COMMISSIONER NYQUIST—This court has already considered one request from the Regents and Commissioner Nyquist to amend its April 30, 1976 decision and find them innocent of any racial discrimination with regard to the B.P.S.S.[5] The court declined to do so then, and it declines to do so now.

The Regents and the Commissioner, through their action in the early and mid-1960's, put the B.P.S.S. on notice that segregation must be remedied. Barring a lawsuit, if the Board of Education refused to act, only the Regents and the Commissioner could force their hand. Conversely, if the City officials were reluctant to act, as they proved to be, inaction by State officials could only encourage the City to continue its old ways. The Regents and the Commissioner were well aware of this. Nevertheless, alleging that they did not bring about the segregation in the B.P.S.S., the Regents and the Commissioner contend that their encouragement and requests that segregation be ended are sufficient to absolve them of liability. This reasoning is fallacious.

In New York State, as this court has explained before, public education is the province of the State Department of Education, which is governed by the Regents and whose chief administrative officer is the Commissioner of Education. Commissioner Nyquist admitted at trial that only action by the Commissioner or by this court could accomplish desegregation of the B.P.S.S. The Regents must have been

aware of this also. Certainly they knew that it was a rare day when a school district voluntarily integrated its schools. 415 F.Supp., at 951, n.48. The Commissioner also testified at trial that the Board of Education's actions "clearly and unequivocally violate the Regents policy." 415 F.Supp., at 958.

It may be, as the Regents and the Commissioner urge, that when state officials have been completely uninvolved with a school district, they should not be held liable for segregation that exists in that school district. But here, the Regents and the Commissioner asserted their authority over the B.P.S.S. and demanded action. Their subsequent failure, over more than a decade's time, to require compliance with their directives served to continue and exacerbate the racial isolation in the Buffalo public schools. The court could only conclude from the Regents' and the Commissioner's actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated. The Regents' continued reliance on their plethora of policy statements urging an end to school segregation is disingenuous. It hardly needs restating that actions speak louder than words.

HOUSING—The housing evidence presented by the plaintiffs was less extensive than the school evidence proper. Much of it dealt with the actions of non-parties. But the conclusion that the Common Council intentionally caused the minority families to be relocated to minority neighborhoods during the Ellicott District redevelopment is supported by the evidence.

As the court noted in its decision, the housing evidence provided an alternative ground for the court's finding of a

constitutional violation. It serves the added purpose of providing a more complete historical perspective to the school situation here, and it punctures the popular conception that all minorities either desire to live apart or are forced to by economic circumstance.

Having found that the defendants were guilty of widespread acts of segregation "affecting a substantial portion of the students, schools, teachers, and facilities within the school system," *Keyes v. School District No. 1, supra,* 413 U.S., at 201, this court then applied the *Keyes* standard to find that the B.P.S.S. was segregated.

The foregoing analysis of the case law and of the facts of this case cause this court to reaffirm its April 30, 1976 decision.

The court must now turn to a consideration of the City and State defendants' plans for the September, 1977 school term. The court sets a hearing on the proposed plan for March 14, 1977 at 11:00 a.m. If the schedules of all parties permit, the hearing will continue daily thereafter until completion. At the hearing, the defendants shall have appropriate Board members and staff present to explain the details of the plans submitted and to explain the inability to file more comprehensive plans to integrate the Buffalo schools.

At a prior meeting, the court has already noted some questions concerning the proposed plans, and the plaintiffs have noted certain objections to the proposals. Furthermore, the hearing last June on the initial plans involved a wide range of problems and indicated the parameters within which the defendants must work. At the hearing, the defendants must be prepared to address themselves to these problems.

Each party is requested to inform the court by March 9, 1977 of the witnesses it expects to call and the estimated length of direct testimony. Any scheduling problems should be called to the court's attention immediately.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: March 1, 1977

FOOTNOTES

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[1] The "cause and effect" language appears to have originated in *Cisneros v. Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972), a school desegregation case in which the court, after announcing: "we discard the anodyne dichotomy of classicial de facto and de jure segregation," set up the following test:

> We need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students.
> 467 F.2d, at 148.

[2] For a list of cases that have considered the use of this standard, *see Austin* II, *supra,* 532 F.2d, at 389, n.6.

[3] The *Hart* court, as well as the *Austin* I and II and *Cisneros* courts relied in part on *Palmer v. Thompson,* 403 U.S. 217 (1971), and *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972). *See* 512 F.2d, at 47-51; 467 F.2d at 150-151, 864-865; 532 F.2d, at 388. The Supreme Court admitted in *Washington v. Davis, supra,* that the *Palmer* and *Wright* cases were susceptible to this interpretation. 426 U.S., at 242-244.

Appendix I—Decision and Order of the United States District Court for the Western District of New York Dated March 1, 1977.

[4] The defendants point particularly to the following passage in the court's decision:

> In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or evenhandedness, or even "badness" or "goodness" on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in *Hart v. Community School Board*, 383 F.Supp. 699 (E.D.N.Y. 1974), *aff'd* 512 F.2d 37 (2d Cir. 1975), to show that the probable and foreseeable result of the defendants' acts was segregation.
>
> 415 F.Supp., at 912-913.

To the extent that this misstates the law on intent after *Washington v. Davis* and *Arlington*, *supra*, the court stands corrected. However, the court believes that although it may have overstated the law in this particular paragraph, the findings on intent, which the court reviews, *infra*, are based on a more narrow standard.

[5] The court's written opinion was dated December 10, 1976.

APPENDIX J

Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
For The Second Circuit

Nos. 12-18, 203 · September Term, 1977

(Argued November 10, 1977 Decided March 8, 1978)

Docket Nos. 76-7292, 76-7391, 76-7449-50, 76-7461, 76-7485, 76-7506, 77-7136

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

v.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

Before: KAUFMAN, *Chief Judge,*
SMITH and MULLIGAN, *Circuit Judges.*

Appeal by the Commissioner of Education of the State of New York, the members of the Board of Regents of the State of New York, the Superintendent of Schools of the City of Buffalo and the members of the Board of Education and the Common Council of the City of Buffalo from judgment of the United States District Court for the Western District of New York, John T. Curtin, *Chief Judge*, finding appellants in violation of the fourteenth amendment to the Constitution of the United States and 42 U.S.C. § 1983 for intentionally causing and maintaining a segregated school system.

Affirmed as to city defendants, reversed as to state defendants and remanded.

LESLIE G. FOSCHIO, Corporation Counsel, Buffalo, N.Y., Anthony Gregory, Assistant Corporation Counsel, and *Patricia A. Pancoe*, City of Buffalo Law Department, of counsel, *for Appellants Buffalo Board of Education and Members of the Buffalo Common Council, and Joseph E. Manch and Eugene T. Reville, Superintendent.*

DAVID BLASBAND (Linden and Deutsch, New York, N.Y.), *for Appellants Members of the Board of Regents of the University of the State of New York.*

JEAN M. COON, Assistant Solicitor General (Louis J. Lefkowitz, Attorney General of the State of New York, Ruth Kessler Toch, Solicitor General and Eugene Panfil, Assistant Attorney General, of counsel), *for Appellants Nyquist, Board of Regents, Black, Pforzheimer, Allan, Clark, Newcomb, Batista and Chodos.*

RICHARD F. GRIFFIN, Buffalo, N.Y., Norman Siegel, New York Civil Liberties Union, New York, N.Y. and William L. Taylor, Catholic University Law School, Washington, D.C., of counsel, *for Appellees.*

* * * * *

SMITH, *Circuit Judge:*

The Commissioner of Education of the State of New York, the members of the Board of Regents of the State of New York, the Superintendent of Schools of the City of Buffalo, and the members of the Board of Education and the Common Council of the City of Buffalo appeal from a judgment of the

United States District Court for the Western District of New York, John T. Curtin, *Chief Judge*, finding them liable for "intentionally causing and maintaining a segregated school system" in violation of the equal protection clause of the fourteenth amendment and 42 U.S.C. § 1983. *Arthur v. Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976).

The appellants raise a number of discrete issues on this appeal, foremost among them, the following:

(1) Whether the district court had subject matter jurisdiction over this suit;

(2) Whether the district court abused its discretion in permitting the addition of the individual members of the Buffalo Board of Eucation and the New York State Board of Regents, in their official capacities, as well as the newly appointed Buffalo Superintendent of Schools, as parties defendant in this suit;

(3) Whether the district court applied the proper legal standard in determining that the appellants intentionally segregated the Buffalo school system;

(4) Whether the appellees presented sufficient evidence to demonstrate that the city or state appellants were responsible for unlawful segregative acts;

(5) Whether the district court erred in instructing the state appellants to device a remedial plan involving suburban schools;

(6) Whether it was erroneous for the district court to consider evidence related to discrimination in housing patterns in the Buffalo area.

We have determined that the district court had subject matter jurisdiction over this suit, and personal jurisdiction over the appellants. It understood and used the proper legal standard in determining whether intentional segregation was practiced. We have examined the record and find that it contains sufficient evidence to warrant the court's finding that the city appellants are liable for unlawful segregative acts. There is, however, insufficient evidence to warrant a finding of liability on the part of the state appellants. Accordingly, we affirm the judgment of the district court with respect to the Buffalo Superintendent of Schools and the members of the Buffalo Board of Education, in their official capacities, and we reverse its judgment with respect to the New York State Commissioner of Education and the members of the State Board of Regents, in their official capacities.

History of the Case

Parents of a number of Buffalo schoolchildren, the Citizens Council for Human Relations, and the NAACP, Buffalo Branch, brought this class action suit against state and city authorities alleging the creation, maintenance, and perpetuation of segregated schools in Buffalo, New York. They filed their initial complaint in this action in June, 1972, and later successfully moved to add as defendants the Mayor of the City of Buffalo and members of its Common Council.

Following the filing of a joint stipulation of facts, trial was held before Chief Judge John T. Curtin in October, 1974. In April, 1976, appellees moved to add as parties defendant the newly appointed Superintendent of Schools, members of the Buffalo Board of Education, and members of the Board of Regents.

On April 30, 1976, Judge Curtin granted the appellees' motion, and simultaneously issued the Decision and Order which found state and city appellants liable for intentional racial discrimination. 415 F. Supp. 904 (W.D.N.Y. 1976). Remedy hearings were held in June, 1976, and a preliminary remedial Decision and Order was issued on July 9 of that year. Motion to reconsider the April 30 decision was denied, and the state and city parties filed notices of appeal.[1]

On the following December 14, however, Judge Curtin directed all parties to brief the United States Supreme Court's opinions in *Austin Independent School District v. United States*, 429 U.S. 990 (1976), and *Washington v. Davis*, 426 U.S. 229 (1976), as they might impinge on the instant case. On March 1, 1977, in response to a motion made by city appellants, Judge Curtin filed a Supplementary Decision and Order reconsidering and affirming the Decision and Order of April 30, 1976. 429 F. Supp. 206 (W.D.N.Y. 1977).

Appeal is taken from the district court's finding of liability, remedial order, and reaffirmation of the appellants' liability.

Jurisdiction

Appellants argue here that the district court lacked jurisdiction over this action, for the suit was in reality brought against governmental entities which are not "persons" within the meaning of 42 U.S.C. § 1983. They argue, further, that the court erred in adding as defendant individual members of the Buffalo Board of Education and the New York State Board of Regents. These conclusions follow from three central premises: (1) liability under § 1983 is "personal," and the officials sued were, for the most part, not members of the respective boards at the time of the alleged

constitutional violations; (2) the addition of parties defendant following the conclusion of trial violates the due process rights of these individuals, for they were unable to be heard to defend themselves against the charge of unlawful behavior; and (3) the proof at trial was directed at state and city boards, entities which cannot be found liable under § 1983. Substitution of individual members for governmental entities is, it is alleged, a mere sham in this case, and hence insufficient to cure jurisdictional defects.

We believe to the contrary that the district court did have subject matter jurisdiction in this case. The appellees brought this action pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3).

Section 1983 provides:

> Every person who, under color of any statute . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The United States Supreme Court has construed the term "person" in § 1983 narrowly, holding that municipalities are immune from suit under the statute. And this is true both in damage actions and when injunctive relief is sought. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961).[2] These holdings have been gradually expanded so as to exempt other kinds of municipal entities,[3] states, and counties.

The Supreme Court has not yet addressed the issue of whether school boards are "persons" within the meaning of § 1983. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 279 (1977). This court, however, has held that they are not to be so construed. *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3508 (January 25, 1977)[4]. Whether state agencies, like the Board of Regents, are "persons," is a more difficult matter to ascertain, and must be considered on a case by case basis. See, *e.g.*, *Forman v. Community Services, Inc.*, 500 F.2d 1246 (2d Cir. 1974), *rev'd on other grounds sub nom. United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); 1 *Moore's Federal Practice* ¶0.62[9] n. 24. But however this may be, the eleventh amendment to the United States Constitution acts as an independent impediment to suits against the states and their agencies. See *Mount Healthy City School District Board of Education v. Doyle, supra*, 429 U.S. 274; *Edelman v. Jordan*, 415 U.S. 651 (1974).

While municipal school boards and state boards of regents may be exempt from suit under § 1983, their members, sued in their official capacities, are not. Thus it is settled law in this circuit that "municipal and state officials, sued in their official capacities, are 'persons' within the meaning of § 1983 when they are sued for injunctive or declaratory relief." *Monell, supra*, 532 F.2d at 264.

In the case of states and their component agencies[5] which are protected by the eleventh amendment as well as by § 1983, the Supreme Court has permitted suit against state officials and employees of state agencies since as early as 1908, in its opinion in *Ex Parte Young*, 209 U.S. 123 (1908). There the Court created the legal fiction that a state officer who violates the federal constitution acts under color of state law, bringing

his unlawful action within the purview of § 1983, but at the same time loses his status as a state official, and hence the protection of the eleventh amendment. While the Court's analysis may not be conceptually clear, and indeed may even be internally contradictory, it has been the case since *Ex Parte Young* that suits against state officials for equitable relief restraining unconstitutional conduct have usually been entertained by the federal courts.[8] An analogous fiction sustains claims against city officials and members of city boards and agencies when equitable relief is sought under § 1983.

Appellants, however, do not abandon the argument at this point. Rather they press it to its logical limit by arguing that the individuation which is required to avoid eleventh amendment and § 1983 limitations on subject matter jurisdiction also governs liability under the statute. Since most board members did not assume office until after the discriminatory events alleged at trial, and since board members were joined as parties defendant only after the conclusion of the trial, appellants argue that they cannot, strictly speaking, be liable, and that the court has no jurisdiction as to them.

In support of the contention that liability under § 1983 is to be construed as strictly personal, appellants cite *Rizzo v. Goode*, 423 U.S. 362 (1976), and a number of related cases which hold that the doctrine of *respondeat superior* is not applicable to the determination of a defendant's liability under § 1983. They assert that these cases demonstrate that to be subject to the court's jurisdiction, and liable under the statute, an official must be personally responsible for the unconstitutional acts complained of by the parties plaintiff.

To the extent that the argument advanced by the appellants exploits the fiction created in *Ex Parte Young*, it is both novel

and intriguing. Further examination shows, however, that it cannot be sustained on its merits.

Discussion of subject matter jurisdiction and liability under § 1983 implicates three different types of entities: (1) corporate bodies understood as collective units; (2) constituent members of those corporate bodies in their corporate or representative capacities; and (3) constituent members of those corporate bodies in their personal or individual capacities. The first two of these categories are, for most jurisprudential purposes, interchangeable. Just as any complex entity can be viewed either from the aspect of its entirety or from the aspect of its component parts, the same is true of government boards and agencies. To speak, then, of board members in their official, or corporate, capacity is to speak more of placeholders or ciphers than of living persons. And to impute liability to such a board member is not to impugn any particular office holder, but rather—in a sense—the office itself. If liability can be said to attach to a particular person by reason of his assuming office, than it must equally be said to dissolve when that person leaves office.

By contrast, board members in their individual capacities are specific, identifiable individuals who are legally significant apart from any office which they may, from time to time, hold. Liability which attaches to such an individual must attach by reason of what he, himself, did or failed to do, and not by reason of his assumption of office.

While not always explicitly, the Supreme Court has at least implicitly recognized this tripartite classification. Thus while the Court distinguishes between states as corporate entities and their officials for purposes of establishing the *Ex Parte Young* doctrine, it also distinguishes between officials in their

representative and individual capacities. This can be seen in the Court's recognition that suits against officials in their representative capacity are only sometimes legally equivalent to suits against government bodies, *Edelman v. Jordan, supra,* 415 U.S. 651, and in the simultaneous recognition that some suits against officials, *e.g.*, suits for intentional tortious interference with constitutional rights, warrant monetary damages assessed against the *individuals* personally involved despite the fact that they are officials. *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In the latter case, the Court recognizes the existence and potential personal liability of state officials sued for damages in their individual capacities.

Appellants in the instant case would have us merge the latter two of these three categories, thereby adopting a strong requirement of individuality, both for purposes of establishing subject matter jurisdiction and for proving liability under the statute. We decline this invitation, however, both because it is jurisprudentially unsound, and because it is productive of practical absurdities.

Appellees seek declaratory and injunctive relief against members of the Board of Education and Board of Regents *in their official capacities only.* Such an action is not barred as equivalent to a suit against the boards under the doctrine of *Edelman v. Jordan, supra,* 415 U.S. 651, and *Monell v. Department of Social Services of the City of New York, supra,* 532 F.2d 259, nor is it equivalent to a damage action brought against the officials as individuals under *Scheuer v. Rhodes, supra,* 416 U.S. 232. Rather, it falls squarely within the second category noted above. The individuals sued as officials merely stand in place of the board they comprise. The board and its members comprise the same entity viewed from different perspectives; thus they are freely interchangeable, for jurisprudential purposes, before, during and after trial. On this view, then, it is misleading to think of the various board members as parties defendant added after the close of trial. The better view is that the judge's order merely substitutes equivalent parties, different in name but identical in fact.[7]

Rizzo and other cases cited by the appellants for the proposition that § 1983 requires strictly individuated proof are not in point. Indeed *Rizzo* distinguishes and approves school desegregation cases in which no such theory of individuated jurisdiction or liability was apparently advanced.[8]

Any other result would be insupportable, for it would lead to the conclusion that merely by electing new members to a board of education each time a civil rights suit was lodged, a community could perpetuate unlawful segregation by immunizing its officials from suit under § 1983. We do not believe that this was the intention of Congress in passing anti-segregation legislation, or of the Supreme Court in interpreting it.[9] Appellants are properly before the Court for determination of the legality of their past actions and the propriety of relief addressed to their future actions.

Segregative Intent

Appellants urge that the district court used an erroneous legal standard in determining that city and state officials acted with segregative intent. To understand the nature of this argument, it is necessary briefly to review the Supreme Court's major holdings in the area of school desegregation.

In *Brown v. Board of Education,* 347 U.S. 483 (1954), the Supreme Court overruled the "separate-but-equal" doctrine first announced in *Plessy v. Ferguson,* 163 U.S. 537 (1896),

holding that government-mandated racial segregation of public schools represents a violation of the equal protection clause of the fourteenth amendment. The Court, however, was unclear as to the particular source of the unlawfulness. *Brown* can be read to condemn segregated schools because they are "inherently unequal." On this reading, the source of the racial segregation is constitutionally irrelevant.[10] Alternatively, *Brown* can be read to condemn only that racial segregation which is caused by intentional discrimination on the part of state officials.[11] Ultimately, this ambiguity was clarified in a series of cases[12] which culminated in *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973), a case which, for the first time, treated racial imbalance in the context of a northern school system which had no history of statutorily authorized school segregation. In *Keyes*, the Court held that only *de jure* segregation—"a current condition of segregation resulting from intentional state action directed specifically [at] the [segregated] schools"—was constitutionally impermissible. *De facto*, or adventitious, segregation was found to be lawful, and hence not a proper predicate for enforced remedial action. While the distinction between *de jure* and *de facto* segregation has been questioned both by the courts[13] and by the academy,[14] the Supreme Court has firmly adhered to the view that only *de jure* segregation violates the Constitution. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Austin Independent School District v. United States*, 429 U.S. 990 (1976), *(per curiam)* vacating and remanding *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976); *Washington v. Davis*, 426 U.S. 229 (1976). Thus, to succeed at trial, a plaintiff must be able to show that school officials purposefully or intentionally acted to segregate students. If

such segregation is merely the effect of an otherwise racially neutral policy it is insufficient to make out a valid constitutional claim.

But while it is clear that the Supreme Court requires *de jure* or intentional segregation, it is also the case that the Court has provided little in the way of elucidation of this concept. Thus a number of divergent views on the meaning of "segregative intent" have developed, which range from the highly subjective to the highly objective. See, Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317 (1976).

In our opinion in *Hart v. Community School Board of Education*, 512 F.2d 37 (2d Cir. 1975), this court sought to strike a balance between competing views of "segregative intent" by extracting from those views that which we found conceptually defensible, and at the same time that which was consistent with the Supreme Court's constitutional mandate. In *Hart*, we held that a finding of *de jure* segregation could be based on acts of omission or commission undertaken by governmental authorities, which have the "natural and foreseeable consequence of causing educational segregation."

We took note of the Supreme Court's recognition of the difficulty of applying a subjective standard of proof in this area. See *Hart v. Community School District Board of Education, supra*, 512 F.2d at 50 citing *Palmer v. Thompson*, 403 U.S. 217 (1971) and *Keyes v. School District No. 1, Denver, Colorado, supra*, 413 U.S. at 233-34. See also, *Arlington Heights v. Metropolitan Housing Development Corp., supra*, 429 U.S. at 264-68; *Washington v. Davis, supra*, 426 U.S. at 253-54 (Stevens, J., concurring); *Wright v. Council of the City of Emporia*, 407 U.S. 451 at 461-62 (1972). And we cited with ap-

proval the opinion of the Court of Appeals for the Sixth Circuit in *Oliver v. Michigan State Board of Education*, 508 F.2d 178 at 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975):

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.
> [Citations omitted.]

See also, *NAACP v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir.), *cert. denied*, 46 U.S.L.W. 3390 (Dec. 13, 1977), which reaffirms the Sixth Circuit's holding in *Oliver*.

In *Hart*, we rejected a purely subjective standard of proof because we were unable to make good sense of the notion of a "collective will" which "intends" a certain outcome, and because of the "injustice of ascribing collective will to articulate remarks of particular bigots," *Hart, supra*, 512 F.2d at 50. We also noted the very difficult problems of proof inherent in the adoption of a subjective definition of "intent."

At the same time, we avoided espousing a purely objective test of intention, for such a view would be excessively broad, bringing virtually all racial imbalance within the rubric of *de jure* segregation.[15] Furthermore, mere foreseeability cannot be identified with intention, for there are surely many cases in which events are both known to be likely, but nevertheless not intended.[16]

In *Hart*, we steered a course between objective and subjective theories of segregative intent by holding that foreseeable consequences, while not specifically identifiable with intention, can provide evidence for its presence. See *Hart, supra*, 512 F.2d 50, 51. Hence our approval of the Sixth Circuit's opinion in *Oliver*, which indicated that foreseeable results created a presumption of segregative intent which could be rebutted by a showing that state actions were consistent with racially neutral policies. Furthermore, we stressed that segregative intent could only be inferred in the context of an examination of alternative policies available to state officials. *Hart, supra*, 512 F.2d at 51.

In adopting this approach, we focused not on the mental processes of a changing group of school board members, but rather on the actions taken by the board itself. When such actions have the "natural, probable, and foreseeable result of increasing or perpetuating segregation," a presumption of segregative purpose is created. The burden of proof then shifts to defendant officials to show that the pattern of actions taken by those officials can be explained in a manner consistent with the absence of segregative intent. Put differently, once the burden of proof has shifted, school officials must be able to demonstrate that no reasonable alternative policy would have achieved the same permissible educational goals with less segregative effect. When such a showing cannot be made, it is entirely reasonable to infer that the officials acted with unlawful segregative intent.[17]

In the instant case, appellants argue that the Supreme Court's vacation and remand of *United States v. Texas Education Agency, supra*, 532 F.2d 380,[18] a case which employs a "foreseeable consequences" test similar to our own, must be taken to implicitly criticize *Hart* as well. We do not agree. The

reasoning which underlies the remand of *United States v. Texas Education Agency* is not clear from the Court's one-line *per curiam* opinion. Justice Powell's concurring opinion appears to locate the lower court's error in its readiness to infer segregative intent exclusively from the use of neighborhood schools, 429 U.S. at 991-92. But this does not apparently challenge the standard used to infer segregative intent, as much as its particular application in that case. Furthermore, Justice Powell appears to approve of the inference of segregative intent from other findings made by the district court. See 429 U.S. at 991-92, n. 1.

In *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S. 252, the Court lists a number of factors, not intended to be exhaustive, which can provide evidentiary support for a finding of segregative intent. These factors[19] do not, however, appear to be in any way inconsistent with the analysis developed in *Hart.* See also *Washington v. Davis, supra,* 426 U.S. at 253 (Stevens, *J.*, concurring).

In sum, then, we believe that the *Hart* test remains valid even after the Supreme Court's opinions in *Washington v. Davis, Arlington Heights v. Metropolitan Housing Development Corp.*, and *Austin Independent School District v. United States.* We find that it is a cogent application of the Supreme Court's requirement of proof of segregative intent, that it avoids conceptual pitfalls inherent in alternative approaches, and that it provides a method of proof which is fair to both plaintiffs and defendants in cases of alleged unlawful racial segregation.

We have reviewed the district court's opinions of April 30, 1976 and March 1, 1977, and find that the court acknowledged the Supreme Court's requirement of a finding

of segregative intent, properly intepreting that requirement in light of our opinion in *Hart.* It follows that the appellants' contention that the court applied an erroneous legal standard is without merit.

The City Appellants

The members of the Buffalo Board of Education, present and former Buffalo school superintendents, and the members of the Buffalo Common Council assert that evidence presented by the appellees is insufficient as a matter of law to demonstrate a violation of 42 U.S.C. § 1983.

We find, however, that the evidence credited by the district court clearly makes out a *prima facie* showing of intentional segregation on the part of the city appellants which has not been successfully rebutted. Much relevant evidence of deliberate segregation has been mustered by the district court in its April 30 opinion, and it will serve no useful purpose to reiterate those findings here. We will, however, indicate those areas which we believe demonstrate, with the requisite degree of certainty, a violation of § 1983 by the city appellants.

Since 1950, Buffalo has experienced a population decline as individuals have moved from the central city to Buffalo's suburbs. At the same time, Buffalo's black population has increased from 6.5% in 1950 to 21% in 1970. Few of Buffalo's blacks live in suburban areas, the majority being concentrated in portions of the inner city. A similar pattern exists in the Buffalo Public School System, where the total student population fell during the period 1966-73 while the minority population rose from 35% to 45.8%.[20]

In 1973-74, the time of the trial of this case, the Buffalo Public School System consisted of 77 elementary schools, 4

middle schools, 2 junior high schools, 7 academic high schools and 6 vocational-technical high schools. While segregation was never mandated by New York State law, significant racial imbalance existed and continues to exist in the schools.

The appellants argue that this imbalance is the product of minority residential patterns coupled with a racially neutral "neighborhood school" policy observed by the school board. But while the racial imbalance in the schools is no doubt partly a product of increasing minority population concentration, this factor alone cannot account for the *extent* of the racial imbalance in the Buffalo schools.

The district court acted well within its discretion in finding, for example, that the Buffalo school board redistricted East High School in a series of actions which began at least as early as 1954. The cumulative effect of these actions was the exclusion from the district of areas of white population density and the inclusion of areas of black population density, making East High School virtually an all-black school. Furthermore, the school board permitted students to transfer from their local high schools when those schools did not teach a particular foreign language which the student wished to study. Substantial evidence indicates that this policy was used to manipulate the racial composition of East High School by systematically permitting white students to transfer to high schools with white majorities. In at least some instances, different standards for obtaining "language transfers" were applied to black and white students.

The school board was put on notice as early as 1962-63 that "language transfers" of this sort contributed to increased racial segregation in the Buffalo schools. Nevertheless, it

continued to permit this policy. Transfers of white students from predominantly black schools were not limited to East High School, but existed in a number of other schools in the city as well.

We believe that Judge Curtin did not err in finding that these changes in attendance zones and the granting of language transfers had the natural and foreseeable effect of increasing racial segregation in the Buffalo schools. At the same time, alternative policies were available to the Board which would have achieved its educational goals while avoiding increased segregation. It follows that the Board's policies give rise to a valid presumption of intentional segregation by Buffalo school authorities.

The district court further found that while the siting of Woodlawn School in the North Masten District was based on racially neutral economic and demographic considerations, the formulation of the school's attendance zone was not. While several possible arrangements which permitted integrated education were proposed, that plan which resulted in the school's having a student population over 99% black was selected. Evidence suggests that this decision was strongly influenced by residents who opposed integrated schooling.

The school board permitted the operation of "optional areas," allowing white students to avoid attending predominantly black schools. This policy clearly had the foreseeable effect of contributing to racial segregation in the Buffalo schools.

Furthermore, discriminatory admission policies in the city's vocational schools, and racially biased recruiting and assignment of staff members, suggest intentional segregation by the school board.

Such a finding is also supported by the Board's record of "dilatory, evasive, and at times obstructionist" actions in response to the State's order to integrate. The Board consistently acted to thwart the directives of the Commissioner of Education and the Board of Regents, and relented only after undue delay and extreme pressure. The Common Council aided the Board in the matter by systematically denying funding to programs which would have encouraged racial integration.

We are unable to imagine a set of facts, short of a public admission of wrongdoing, which would be more suggestive of intentional discrimination. We are confronted here with a pattern of action and inaction the natural and foreseeable consequence of which is the increased segregation of the Buffalo public schools. This being sufficient to make out a *prima facie* case of intentional segregation, it must be inquired whether the appellants have been able to rebut this conclusion. We find nothing in the record, however, which suggests a neutral, non-discriminatory rationale for the pattern of actions taken by the city appellants. No policy, save segregation itself, can consistently explain the pattern of transfers, zoning, optional attendance areas, staff recruitment and assignment, and general obstructionism which marks the actions of the city appellants.[21] We consequently approve the finding of the district court that these appellants acted in intentional violation of 42 U.S.C. § 1983.[22]

The State Appellants

The record is significantly different with respect to the state appellants. As early as 1960, the New York State Board of Regents issued a policy statement urging desegregation of

New York's public schools. This expression of intent has been reaffirmed on many subsequent occasions.

In 1964, parents of Buffalo schoolchildren appealed to the New York State Commissioner of Education, charging that Buffalo had fixed the attendance zone of a junior high school in such a manner as to make the student population over 90% black. The Commissioner found that *de facto* segregation existed in Buffalo, and ordered the Board of Education to submit an integration plan within three months.[23] The Commissioner subsequently found this plan inadequate, and appointed an Advisory Committee to develop a satisfactory program.

The Buffalo Board of Education approved the proffered program "in principle," but then submitted a plan which the Commissioner found "disappointing and unsatisfactory." Finally, on January 30, 1968, the Board submitted a plan which the Commissioner found acceptable. The Board was then ordered to submit periodic reports on the implementation of the program.

This plan, had it been implemented, would likely have reduced racial segregation in the Buffalo schools, but the City's Common Council refused to appropriate funds to implement the Board's plan. In January, 1972, the Commissioner instructed the Board to submit a new desegregation plan; the Board refused to submit such a plan. The Commissioner then sent members of his staff to Buffalo in order to work with the Board in designing a desegregation plan. The Commissioner's staff submitted its recommendations to the Board in November, 1972, but the Board rejected the proposals.

Finally, in January, 1975, following recovery from a heart attack, the Commissioner issued a show cause order to the Buffalo Board of Education in which he threatened to exercise his statutory enforcement powers.

Authority over education in New York State is vested in the Department of Education, which manages and supervises all New York State public schools. The Board of Regents is the statutory head of the Department of Education, and the Commissioner of Education is the chief executive officer of the department. The Commissioner is responsible for the implementation of educational policy formulated by the Board. He can enforce his directives by removing any school officer or member of a board of education who disobeys an order, and by withholding funds from a disobedient school system.

Appellees argue on this appeal that, having primary responsibility for educational policy in New York State, the state appellants are liable for Buffalo's school segregation. They assert that the appellants are liable both because they failed to combat segregation as aggressively as they might have, and, in a derivative sense, because they are legally responsible for the City's segregative acts.

We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.

We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a con-

stitutional violation. As we indicated in *Hart v. Community School Board, supra,* 512 F.2d at 48:

> We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation.

To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case.

Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith.

Similarly, we do not believe that the appellees' theory of derivative or indirect liability can be sustained. Such a theory is precluded by the Supreme Court's opinion in *Rizzo v. Goode, supra,* 423 U.S. 362, which requires a more direct link between the illicit school segregation and an intentional policy adopted by the state appellants which indicates specific approval of the actions of the city appellants. No such approval is indicated in this case.

Under the standard announced in *Hart,* then, we are unable to conclude that the state appellants acted or omitted to act with the required segregative intent, and hence we must reverse the trial court's finding of liability as to these appellants.

Remedy [1]

Thus far we have been exclusively concerned with determining whether constitutional violations can properly be attributed to some or all of the named appellants. While the trial court has taken some preliminary steps in the formulation of an appropriate remedy, no final order has issued in this case. The appellants, however, raise the issue of the appropriateness of an interdistrict remedy, citing paragraph no. 18 of the court's order of July 9, 1976. Appendix, 1286 A and B. We believe, however, that it is both premature and unwise to discuss the appropriateness of any partial remedy in a piecemeal fashion, and in the absence of a more fully-developed record.

Two points with respect to remedy can, however, be considered. First, the Supreme Court has made clear in its recent opinions that not only must a remedy be appropriate to an infraction, but also that it can reach no further than the incremental harm caused by the infraction itself. In the words of Mr. Justice Rehnquist:

> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. [Citation omitted.]
> [*Dayton Board of Education v. Brinkman*, 45 U.S.L.W. 4910 at 4914 (June 28, 1977)].

See also *School District of Omaha v. United States*, 45 U.S.L.W. 3850 (June 29, 1977) (*per curiam*).

At the same time, proof that authorities have pursued an intentional segregative policy in a "substantial portion" of a school district creates a rebuttable presumption that the entire school system is unlawfully segregated, unless the system is divided into "clearly unrelated units." *Keyes v. School District No. 1, Denver, Colorado, supra*, 413 U.S. at 201-03.

Second, while we rejected the appellants' argument that the changing composition of the Buffalo School Board insulated the Board and its members from potential liability under 42 U.S.C. § 1983, the fact that some present incumbents did not participate in the unlawful acts complained of is of substantial legal significance. In formulating a remedy which invokes prospective coercive relief against a successor in office, the trial court must determine that the present incumbent will continue the unlawful practices of his predecessors. See *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605 at 621-23 (1974). It should be stressed that this is not a matter of jurisdiction or of liability, but rather exclusively one of remedy, and is consistent with general principles of prospective equitable relief.

Affirmed as to city appellants; reversed as to state appellants.

FOOTNOTES

[1] The state appellants' motion to reconsider was denied on August 17, 1976. Memorandum decision reported at 426 F.Supp. 191 (W.D.N.Y. 1976). Appellees were awarded interim attorney fees. 426 F. Supp. 194 (W.D.N.Y. 1977). Appellees' motion to dismiss the City's appeal was denied on November 8, 1976. 547 F.2d 7 (2d Cir. 1976).

[2] Neither are municipalities subject to suit on the theory that they are liable under 42 U.S.C. § 1988 when in violation of provisions of state law. See *Moor v. County of Alameda*, 411 U.S. 693 (1972).

[3] See, *e.g.*, *Ybarra v. City of the Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974) (town); *Jorden v. Metropolitan Utilities District*, 498 F.2d 514 (8th Cir. 1974) (utilities district); *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975) (housing authority).

[4] Other circuit courts have disagreed with this conclusion. See, *e.g.*, *Keckeisen v. Independent School District*, 509 F.2d 1062 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975); *Aurora Education Association East v. Board of Education*, 490 F.2d 431 (7th Cir.), *cert. denied*, 416 U.S. 985 (1974).

[5] And individuals who are sued as surrogates for the state, but not component parts of the state. *Edelman v. Jordan*, 415 U.S. 651 (1974).

[6] When an equitable claim lodged against an official is equivalent to a claim seeking funds from the state treasury, it is barred as, in reality, a suit against the state. *Edelman v. Jordan*, 415 U.S. 651 (1974).

[7] These considerations are limited, of course, to actions seeking injunctive or declaratory relief when that relief is not equivalent to an action for damages brought against the state or city boards.

Compare *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Adamian v. University of Nevada*, 359 F. Supp. 825, 827-28, 834-35 (D. Nev. 1973), *rev'd on other grounds sub nom. Adamian v. Jacobsen*, 523 F.2d 929 (9th Cir. 1975).

Even if board members are construed as parties defendant added after the close of trial, such amendment and substitution are permitted, when equity requires, by Fed. R. Civ. P. 15(c) and 21. See 3 *Moore's Federal Practice* ¶¶ 15.08[5] 15.15[4.—1]; 3A *Moore's Federal Practice* ¶ 21.04.

[8] See also *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 at 284 n. 1 (1976) (§ 1983 action against members of city council in addition to council itself sufficient to give jurisdiction under 28 U.S.C. § 1343); *Bishop v. Wood*, 426 U.S. 341 at 343 n. 1 (1976) (§ 1983 action brought against former City Manager and Chief of Police sufficient to give jurisdiction under 28 U.S.C. § 1343); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 at 579 n. 6 (1976) (complaint amended to add individual members of the board as parties defendant bringing case within § 1343 jurisdiction).

[9] It may also be possible to rest jurisdiction over the Board of Education and the Board of Regents, as corporate entities, directly under the fourteenth amendment and 28 U.S.C. § 1331. See *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977). Our decision today does not rely on this theory, however.

[10] See, *e.g.*, *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142, 148 (5th Cir. 1972), *cert. denied*, 413 U.S. 920, 922 (1973) (*en banc*); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *reaffirmed and modified en banc*, 380 F.2d 385, 397-98 (5th Cir.) (Gewin, *J.*, dissenting), *cert. denied*, 389 U.S. 840 (1967).

[11] See, *e.g.*, *Deal v. Cincinatti Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

[12] See, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

[13] *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, at 216 (Douglas, *J.*, concurring), 219-37 (Powell, *J.*, concurring in part and dissenting in part (1973); *Cisneros, supra*, 467 F.2d at 147-48.

[14] Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L.Rev. 564 (1965); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Calif. L.Rev. 275 (1972).

[15] Since most racial imbalance, once established, is foreseeable, any policy which permits such imbalance to continue would, on a strictly objective theory, amount to *de jure* segregation. We believe that such a theory sweeps more broadly than necessary, collapsing the distinction between *de jure* and *de facto* segregation.

[16] A surgeon will operate on a patient knowing that the patient is likely to die despite his best efforts. While the patient's death can be foreseen, it would be inappropriate to say that the surgeon "intended" to bring about the patient's death. See P. Fitzgerald, *Salmond, On Jurisprudence*, at 368-69 (12th ed. 1966).

[17] A similar approach is forcefully defended in Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317 (1976).

[18] See *Austin Independent School District v. United States*, 429 U.S. 990 (1976).

Appendix J—Decision of the United States Court of Appeals for the Second Circuit.

[19] These factors include disproportionate impact, the historical background of the challenged decision, specific antecedent events, departures from normal procedures, and contemporary statements of intention on the part of the decisionmakers.

[20] The absolute number of minority students fell during the period 1970-73.

[21] Neighborhood school assignment policies are lawful only so long as they are applied consistently and in a racially neutral manner. In the instant case, however, neighborhood schools were used only as a subterfuge to mask a consistent and ongoing pattern of discrimination.

[22] Finding, as we do, that there is sufficient evidence in this case to sustain the trial court's finding of segregative intent on the part of the city appellants, we do not today reach the issue of the relevance of evidence related to independent governmental action which furthers discrimination in residential housing patterns.

[23] *Matter of the Appeal of Yerby Dixon*, 4 Ed. Dept. Rep. 115 (1965).

APPENDIX K

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of May, one thousand nine hundred and seventy-eight.

Present: HON. IRVING R. KAUFMAN, *Chief Judge.*
HON. J. JOSEPH SMITH,
HON. WILLIAM HUGHES MULLIGAN,
Circuit Judges.

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILEHELMINA SEALES, JOHN MEDIGE, *et al.*,

Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of N.Y., THE BOARD OF REGENTS OF THE STATE OF N.Y., *et al.*,

Defendants-Appellants,

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo,

Defendant-Appellee.

Docket No. 76-7292

Appendix K—Order Denying Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX L

Order Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of May, one thousand nine hundred and seventy-eight.

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILEHELMINA SEALES, JOHN MEDIGE, *et al.*,

Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of N.Y., THE BOARD OF REGENTS OF THE STATE OF N.Y., *et al.*,

Defendants-Appellants,

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo,

Defendant-Appellee.

76-7292

Appendix L—Order Denying Petition for Rehearing En Banc.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.

APPENDIX M

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-1000

MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF BUFFALO AND THE SUPERINTENDENT OF SCHOOLS,

Petitioners,

v.

GEORGE ARTHUR, *et al.*

UPON CONSIDERATION of the application of counsel for petitioners(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 5, 1978.

/s/ THURGOOD MARSHALL,
Associate Justice of the Supreme Court of the United States.

Dated this 26th day of May, 1978.

FILED
JUL 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-301

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Petitioners,

against

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Respondents,

and

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1978

No. .....

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Petitioners,

against

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Respondents,

and

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted, on behalf of respondents New York State Commissioner of Education, the Board of Regents of the University of the State of New York, and the individual members of the Board, in opposition to the petition by the Mayor and Common Council of the City of Buffalo and the Superintendent of Schools and the Buffalo Board of Education, seeking review by certiorari of the decision of the United States Court of Appeals for the Second Circuit (573 F. 2d 134; Appendix J to the petition), which reversed in part and affirmed in part a decision of the United States District Court for the Western District of New York (415 F. Supp. 904; Appendices C, D, G and I to the petition), which had found the Buffalo schools to be unconstitutionally segregated and that both the State and City defendants were responsible therefor. The Circuit Court affirmed as to the City defendants and reversed as to the State defendants.

Questions Presented

1. Does not the record evidence fail to supply the requisite proof of intent to segregate on the part of the State defendants, regardless of whether the Circuit Court's test complies with prior decisions of this Court?

2. Where the evidence differed as to the acts of the State and City defendants could not the Circuit Court arrive at different conclusions in the responsibility of each for the segregation of the Buffalo schools?

3. On review of the Circuit Court's decision, are not references by the District Court to independent non-governmental party actions irrelevant where the Circuit Court did not refer to them or apparently consider them?

Constitution and Statute Provisions Involved

Respondents see no relevancy in the citation of 42 U.S.C. § 2000c-6 in the petition, which section relates solely to Federal action and no Federal agency is a party to this action.

Respondents also note that subdivision 2 of New York Education Law, § 3201, quoted in the petition, was declared unconstitutional in *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y., 1970), affd. 402 U.S. 935, prior to the commencement of this action and is no longer a part of the law of the State of New York and is irrelevant to this action.

Similarly, the provisions of the New York Public Housing Law, quoted in the petition are irrelevant since housing discrimination was not considered by the Circuit Court as contributing to petitioner's responsibility for segregation.

Statement of the Case

A. Procedural History

This action was commenced on June 26, 1972, by service of the complaint, seeking a declaratory judgment and injunctive relief under 42 U.S.C. § 1983, contending that defendants* had deprived plaintiffs and others similarly situated, who are parents of children enrolled in public schools in Buffalo, of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs alleged that the public schools in the City of Buffalo are racially segregated as a result of "policies, practices, customs and acts of omission and commission" by defendants and by other units and agencies of government.

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* At the time the action was commenced only the State Commissioner of Education, the Board of Regents, the Superintendent of Schools of the City of Buffalo and the Buffalo Board of Education were named as parties defendants.

The State defendants moved to dismiss the complaint on; among other grounds, lack of subject matter jurisdiction of the action and failure to join as parties the other units and agencies of government whose acts were alleged to have caused or contributed to the segregation of the Buffalo schools. The City defendants also moved to dismiss the complaint. That latter motion was orally denied by the Court. No decision was ever issued on the State motion nor order entered on the Court's decision as to the City's motion.*

After a long period of examinations before trial, the action was tried over a period of nine days in the Fall of 1974. Thereafter, plaintiffs moved to amend their complaint to add the mayor and common council of the City of Buffalo as parties defendant; which was granted. Subsequently, a second motion was made and granted to add the individual members of the Board of Regents and Buffalo Board of Education as parties defendant, in both their official and individual capacities.

On April 30, 1976, the Court handed down its decision holding that defendants had violated plaintiffs' Fourteenth Amendment rights to equal protection of the laws by intentionally causing and maintaining a segregated school system in the City of Buffalo. Also on April 30, 1976, the Court granted plaintiffs' motion to add the new superintendent of schools and the individual members of the Board of Regents and the Board of Education of the City of Buffalo as defendants.

On June 10, 1976, the Court amended the second order of April 30, 1976 to specifically state that the Board members were added as defendants in their official capacities only and not as individuals.

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* The District Judge before whom those motions were heard died several months thereafter.

On June 16, 1976, counsel for eight of the members of the Board of Regents moved for reconsideration of the Court's April 30 judgment on the merits of the action. That motion was subsequently joined in by counsel for the other State defendants. On August 17, 1976, the Court orally denied these motions and on December 10, 1976, handed down a formal decision and order thereon.

Subsequent to the decision of this Court in *Austin Independent School District v. United States*, 429 U.S. 990 (1976), the District Court directed the parties to analyze and brief the application to this action of the decision in *Austin* and that in *Washington v. Davis*, 426 U.S. 229 (1976). Thereafter, on March 1, 1977, the Court reaffirmed its decision of April 30, 1976.

All defendants appealed to the United States Court of Appeals for the Second Circuit which, by decision dated March 8, 1978, affirmed the District Court's decision as to the City defendants and reversed as to the State defendants. From that decision the city defendants have now petitioned this Court for certiorari.

B. Facts

In 1960, the Board of Regents of the University of the State of New York ("the Regents"), which has statutory policy making authority over education in the State of New York, both public and private, and elementary, secondary and higher education, issued a policy statement urging the desegregation of New York State's public schools. Similar policy statements have been issued by the Regents periodically from that time to the present, all reaffirming a policy position for the elimination of racial imbalance in the public schools, whether a result of *de facto* or *de jure* segregation. In 1963, all school boards were requested by the then Commissioner of Education, James Allen, to identify to

the State Education Department those schools in their districts having a black enrollment in excess of 50%. Guidelines for desegregation were drawn up with primary emphasis on local control and local action to effect desegregation.

In 1964, the City of Buffalo Board of Education ("the Board of Education") fixed the attendance zone for a newly constructed junior high school (Woodlawn), selecting a plan for that zone which resulted in the school being over 90% black, although other plans had been proposed which would have resulted in a racially integrated school. Certain parents of Buffalo school children took on appeal to the Commissioner of Education, a proceeding provided for in the New York Education Law, alleging that the Buffalo public school system ("BPSS") was racially imbalanced, that the Board of Education had failed to take action to alleviate imbalance and that there was also discrimination against blacks in the recruitment and distribution of teachers. As to the latter charges, the Commissioner found no supporting evidence had been presented. The Commissioner on that appeal found *de facto* segregation to exist in the Buffalo schools *(Matter of the Appeal of Yerby Dixon*, Ed. Dept., Rep. 115).

In his decision in *Yerby Dixon*, then Commissioner Allen found (p. 118):

> "It must be apparent to the petitioners, however, as well as to everyone else concerned, that there is not and cannot be an easy or instant solution to the problem which is the main thrust of this appeal. Involved in the ultimate solution to *de facto* segregation in a school system is of course the elimination of segregated housing, slum conditions and other undesirable scio-economic conditions which lie beyond the control of the board of education or of the Commissioner. Not only is the problem *per se* a complex and difficult one in Buffalo, but the Board of Education is handicapped by the fact that it is by law fiscally dependent on the municipal government and that the city school district is severely restricted by the constitutional tax limitation."

Those limitations are no less true today and there is no question but that they have severely limited the progress which could be made in racially balancing Buffalo schools. In that appeal, the Commissioner ordered (pp. 118-119):

> "Jurisdiction over this appeal is retained by me pending the adoption by the Buffalo Board of Education of a plan for mitigating the problem of racial imbalance which meets with my approval. Furthermore, I am reserving the right to make such further order or orders in this case as shall be necessary to effectuate a plan approved by me.
>
> "*It is ordered* that the Board of Education of the City School District of the City of Buffalo prepare, approve and submit to me on or before May 1, 1965, a plan for the progressive elimination of racial imbalance, including the steps to be taken in this direction beginning with the school year 1965-66."

Initial attempts to implement racial integration were the immediate subject of legal challenge. The Second Circuit Court of Appeals in *Offermann v. Nitkowski*, 378 F.2d 22 (1967), affg. 248 F. Supp. 129, recognized that there is no constitutional duty to undo *de facto* segregation in the schools, but upheld the constitutional right of the State to elect to do so and to direct compliance by local school districts. The State's actions thereafter must be viewed from the standpoint of a policy of undoing *de facto* segregation, rather than a confrontation with *de jure* segregation.

In the February 1965 order, the Commissioner directed that a plan for elimination of racial imbalance be submitted to him by May 1, 1965. The report was submitted by the Board on May 1, 1965 and objections thereto were filed on behalf of the appellants in *Yerby Dixon*. A hearing was held by Commissioner Allen on August 18, 1965 and his findings were sent to the Buffalo Board of Education by letter dated October 8, 1965 (Ex. 160, Ex. III thereto). In that letter, Commissioner Allen stated:

> "I find the report submitted by the Board for the progressive elimination of racial imbalance disappointing. It fails to come to grips realistically with the problem and to present a long range solution or to identify the barriers which must be overcome in order to reach a solution. I do not feel that the Board's report deals in sufficient depth with the large and complex problems facing the school system."

The letter points out that a meeting was held in Buffalo between the Commissioner, the President of the Board of Education and the Superintendent of Schools which was followed on September 22 by a statement requesting the assistance of the State Education Department in the preparation of a plan to eliminate racial imbalance. The Commissioner appointed the Associate Commissioner for Research and Evaluation to work with the Board of Education on such a plan.

In January 1966, the Commissioner appointed an Advisory Committee for the Study of Buffalo Schools, chaired by Ira Ross, President of the Cornell Aeronautical Laboratory. Arrangements were made for a study to be made by the Center for Urban Education ("CUE"), a national educational laboratory, supported by Federal funds appropriated under Title IV of the Elementary and Secondary Education Act of 1965. The report, entitled "A Plan for Accelerating Quality Integrated Education in the Buffalo Public School System" was transmitted to the Board of Education on August 23, 1966 by Commissioner Allen (Ex. 160, Ex. III thereto).

On September 14, 1966, the Buffalo Board of Education approved the plan "in principle" (Ex. 160, Ex. III). On the same date, Commissioner Allen wrote to the president of the Buffalo Board of Education requesting that the Board file with him, by October 15, 1966, its plans for elimination of racial imbalance (Ex. 160, Ex. III). This deadline was subsequently extended to November 15, 1966 (Ex. 160, Ex. III).

On November 3, 1966, the Superintendent of Schools submitted to the Board of Education a plan for racial balancing of the schools, generally referred to in this litigation as "The 16 Point Plan" (Ex. 160, Ex. III). The basic proposals of this plan were neighborhood schools for first 5 grades, ultimately K-4; assignment of inner-city pupils in Grades 6-8 to schools in peripheral areas of the city; construction of West Hertel School as a middle school; planning and construction of a new eastside high school; and one demonstration middle school to open in September 1967. The remaining proposals were primarily programs in compensatory education for inner-city pupils.

The primary differences between the CUE proposal and the Board proposals were the proposal for an educational park at the old State University campus, a greater emphasis on faculty and administrative integration; and the consolidation of all schools into 5 districts with educational parks (Ex. 160, Ex. III).

The Board report was submitted to Commissioner Allen on November 14, 1966 (Ex. 160, Ex. III).

Special state-aid for integration assistance was approved for Buffalo for the 1966-67 school year in the amount of $130,558.50 for project SITUP at School 54 and for coordination of integration (Ex. 160, Ex. III).

On June 7, 1967, Commissioner Allen again wrote to the President of the Buffalo Board of Education pointing out that the Buffalo recommendations had been the subject of a hearing at which all parties to the *Yerby Dixon* appeal were given an opportunity to be heard and submit additional data. As to the Board proposal, the letter states (Ex. 160, Ex. III):

> "The latest recommendation and accompanying materials submitted by the Board have been reviewed by the staff of the Department and by me and, I am sorry to

say, are found to be disappointing and unsatisfactory, lacking in specificity and devoid of any real evidence of a serious intent on the part of the Board to reduce significantly racial imbalance in the Buffalo School System."

Commissioner Allen directed then Deputy Commissioner Nyquist and staff members of the Education Department to visit Buffalo and consult with the Board concerning the kind of plan and program of action which would be needed (Ex. 160, Ex. III). That meeting was held in July, 1967 after which Deputy Commissioner Nyquist wrote to the President of the Board of Education setting forth in detail the areas of disappointment with the Board's recommendations (Ex. 160, Ex. III). Those were 1) a lack of a detailed comprehensive plan with a definite timetable for action; 2) a lack of practical steps to educate public opinion toward integration; 3) a lack of depth in the integration planning staff of the Board; and 4) "the submission of a full plan has taken more time than seems warranted under the circumstances" (Ex. 160, Ex. III). The date of November 15, 1967 was set as the date for submission by the Board of a timetable for development and carrying out of an integration plan. That was eventually changed to require an interim report by November 15 and a final report by December 15 (Ex. 160, Ex. III).

The December 15 deadline was extended at the request of the Board to January 31, 1968. A subsequent request was made for a further extension to March 1, 1968 (Ex. 160, Ex. III). Commissioner Allen directed that a plan be submitted by January 31 to be updated on March 1 and to constitute the Board's "firm commitment" (Ex. 160, Ex. III). On January 30, 1968, the Board transmitted its recommendations to Commissioner Allen (Ex. 160, Ex. III). The Board recommended the organization of the school system into a 6-4-4 program. The six-year unit to include pre-kindergarten and Grades K-4, to be housed in neighborhood schools. When neighborhood

schools in inner-city require replacement, they would be built in peripheral areas where an integrated student body could be enrolled. The Board recommended a middle school program of 15 schools to be integrated 1/3 black and 2/3 white. These would include Fillmore, which had been converted to a middle school, conversion of Genesee-Humboldt and Southside Junior High Schools to middle schools and the construction of 12 new schools. Woodlawn would be developed as a "magnet school" and Clinton discontinued and its student body dispersed.

As to secondary schools, the Board recommended inclusion of all ninth grades in the high school buildings, study of high school programs, expansion of vocational courses; construction of a comprehensive high school on southeast side of the city, development of a school at Main and Delevan, development of a plan to either integrate East High or distribute its pupils in other high schools, and open enrollment at all high schools on a city-wide basis. The Board recommended planning for an educational park or parks, including a metropolitan educational park, if possible.

The Board proposed a school construction schedule which would open the West Hertel Middle School in September, 1969; add a 5th grade to Fillmore in September, 1970; open the new Main-Delevan High School and the new East Side High School in September, 1971; Genesee-Humboldt and Southside Junior High Schools would be converted to middle schools by September, 1971; and between September, 1971 and September, 1973; at least 4 additional middle schools would be opened each year.

Recommendations for staffing included placement of more black teachers in white schools, and increased emphasis on recruitment of black teachers.

On May 21, 1968, Commissioner Allen replied to the Board's recommendations (Ex. 160, Ex. III). In his letter, the Commissioner stated:

> "The January 31, 1968 report presents a comprehensive plan for improved racial balance with a definite timetable for action."

After recapitulating the major points of the recommendation, the letter concluded:

> "After a detailed examination of the Board of Education report of January 31, 1968 and considering the continuing action of your Board and staff, I ask that you continue planning and acting toward the progressive elimination of racial imbalance; and that you transmit to me as of November 15, 1968, a report of action taken toward meeting the plans and any further amendments or improvement in planning which affect the policy of the Board of Education."

Had the 1968 plan been implemented, Buffalo schools would have been substantially integrated. However, implementation was delayed. The Common Council delayed approval of final funding of the West Hertel Middle School, denied funding for planning or construction of other middle schools and passed zoning legislation which sought to bar the use of portable classrooms for the integration of existing schools. This latter legislation was ultimately held invalid.

In 1969, Chapter 342 of the New York Laws of 1969 was enacted by the State Legislature which prohibited an appointive school board from setting attendance zones or assigning pupils for the purpose of racial balance. The Board of Education construed that law as preventing any integration moves except voluntary transfers. Plans were made to implement such voluntary assignments of pupils (Ex. 128). That statute was ultimately held unconstitutional (*Lee v. Nyquist, supra*), but it had the interim effect of delaying integration.

The report for 1970 indicated progress being made toward integration of Buffalo schools which, if carried through, would have achieved the aim of the Commissioner's 1965 order.

Unquestionably, the basic proposal of the Board of Education for integrating the schools was the Middle School program.

However, in December, 1971, a letter from the Buffalo Citizens' Council on Human Relations to Commissioner Nyquist contended that the Common Council would not appropriate necessary school construction funds, and that the Board of Education would not change its plans for integration even though the Common Council inaction had made the plan impossible to carry out, and, indeed, that the Board had failed to carry out some of its other promises that did not need funding (Ex. 41).

By letter dated January 20, 1972, the Commissioner wrote to the Board (Exh. 42):

> "I ask that you strengthen your efforts to develop a plan different from the one originally formulated as a consequence of the *Yerby Dixon* appeal. I do not suggest that eventual implementation of a 4-4-4 plan of organization be precluded, but do strongly urge the elimination of segregation in the early grades where integration is most easily achieved and most effective in the lives of children."

The Commissioner requested the Board to submit, by April 1, 1972, a new desegregation plan which would substantially reflect the racial composition of the entire district with an interim report by February 15, 1972 on progress.

On March 23, 1972, the Board advised the Commissioner (Ex. 51):

> "We regret to advise you that we are unable, consistent with our responsibilities as we see them, to submit any plan to you by which, within the period of time you apparently have in mind, '*** every school would substantially reflect the racial composition of the entire district. ***' "

On March 28, 1972, the Board "received and filed" a staff report entitled "A Study of Desegregation" (commonly referred to as the "Heck Report") (Ex. 47). At the same meeting the Board expressed itself as opposed to "any form of forced busing". The following day, Arnold Gardner, who was then President of the Board of Education wrote the Commissioner alleging willful refusal on the part of the Board and listing what he contended were acts of *de jure* segregation on the part of the Board (Ex. 50).

On April 6, 1972, Commissioner Nyquist advised the Board that he was directing members of his staff to work with the Board in developing a desegregation plan (Ex. 52). On May 22, 1972, the Commissioner's task force arrived in Buffalo and remained for two weeks.

On November 8, 1972, the recommendations of the task force, in the form of a plan for desegregation, were transmitted to the Board by Commissioner Nyquist with a request for response by January 3, 1973 (Ex. 131).

For grades K-8, the plan proposed two alternatives. The first was the Heck plan proposal; the second added elements to that plan. The plan would create 5 districts, all including a part of the black residential section of the city. Within each district a 4-4-4 plan would be established, with all schools integrated from K-12. All children would be transported for only 4 of the first 8 years of school. The second alternative would divide K-8 grades into 3 sections with all schools in a district serving the same grade levels located as close together as possible. This would involve more busing than the first

proposal. Under the first plan the annual cost for busing for integration would be $2,874,716; after the first year, State reimbursement would reduce the city's cost to $287,472. The cost of transportation in the second plan would approximate $4,000,000 in the first year, with subsequent annual costs of $400,000. It was anticipated under the Heck plan all schools could be integrated by September, 1974 and a year earlier under the second alternative.

The Board voted to "receive and file" that report as well and to advise the Commissioner that the Board "did not find in the report any basis for a solution of the problem before it" (268).

Of course, by this time not only was the instant action pending (commenced June 26, 1972) but also an HEW compliance review which had been commenced in February, 1971 and was subsequently suspended pending the outcome of this action.

Commissioner Nyquist testified at the trial of this action that, because of the lapse of time since the 1965 order, before making a final order relative to desegregation he had proposed to hold a hearing on a show cause order and that that hearing and those relating to school districts other than Buffalo had been postponed because of the Commissioner's hospitalization in the spring of 1974. The show cause orders were subsequently issued and hearings scheduled relative to 5 school districts in the State, including Buffalo.

As to some cities, final desegregation orders have been issued. The hearing relative to Buffalo resulted in the approval of a desegregation plan submitted to the Court below as a proposed remedy in the instant action. Commissioner Nyquist further testified as to events which occurred since he took office in 1969:

> "Beginning since I became Commissioner and I think in the preceding questions, we brought that out. The law

was passed just before I became Commissioner which eventually was declared unconstitutional which prevented me from doing anything about racial integration really, except encouraging it. I can do that, and when that was cleared up, I decided to take a little different tact from my predecessor and that is to involve the community and try by persuasion to get a plan developed. It is a much better, sounder way of going about it and that took time. It was,—and I also wanted to build, let the Board and the community have,—the Board, really, because they are in charge, give them every possible opportunity so that looking towards in the kind of political climate we had at that time, including Mr. Nixon's stand on busing, looking toward the time that if an appeal were taken by the Board, I would have a sound, reasonable, painstaking legal record of what had been done. Just about that time, my Director of Division of Intercultural Relations who does this work had a heart attack and died and that also held us up and we were short of staff, and then in '73 bringing it down to that time, we had a couple of new Regents on the Board and they wanted to be involved in the proceedings and to see if they couldn't help and I think here in Buffalo that was the case, and that brings down, that took some more time. That brings it down to April of '74 when I had already issued three show cause orders in three other communities and two more to go and one of them was Buffalo and I had a heart attack and I didn't recover fully from that until July.

"Q. Is that July '74? A. Yes, this year. By that time, on advice of counsel and my Deputy Commissioner and my own conviction, I didn't think that we should issue an order for,—you know, opening of school coming the first of September and so that we waited then for the Supreme Court decision to see if the Detroit case would help us any and it didn't and then along about that time, finally the Regents themselves raised the question, a couple of the Regents, should they not review their racial integration policy. We have had the exhibits here and I expect them and because I was not going to issue a final order if that was the outcome of a show cause order on a hearing, because I wouldn't issue it for the opening of school in '74, I just decided to wait and the Regents are going to come out with their new policy and in a sense of after reconsidering it, they may reaffirm it. I don't know what they will do. I am hopeful they will reaffirm it. That will come at the end of October. I think that's the whole story covering the five years I have been Commissioner."

The Regents did in fact reaffirm their prior position as to racial balance.

The Commissioner further testified that after a show cause hearing, he could issue a final order relative to desegregation of the schools. Testimony then proceeded:

"Q. *** Now, when you issue this final order, Dr. Nyquist, and if you did issue a final order after such a hearing, which was disobeyed, is that the time that you consider taking the steps of exercising your powers of sanction? A. Yes. That is true. I mean, you can't take away State aid or ask or try to institute proceedings through Board members until you have issued a final order and that hasn't been done."

On October 10, 1973, Dr. Nyquist issued a report to the Regents concerning his integration reports which included Buffalo as well as other communities (Ex. 151). The part of the report concerning Buffalo recounted the recalcitrance of the Board of Education in 1972 and 1973 and rejection of integration plans advanced by the Commissioner. It then concluded (920-921):

"Because of this impasse, the Commissioner was left no alternative but to order the Buffalo Board of Education to implement a plan of desegregation prepared by the State Education Department. Accordingly, on August 2, [1973], the Division of Intercultural Relations submitted to the Deputy Commissioner two copies of a draft of a show cause order for

desegregation of the Buffalo Schools. The order is currently [10/10/73] in office of counsel. It embodies the essential elements of the study prepared by our staff in 1972. Meanwhile, Regent Genrich has been making an attempt to obtain cooperation of the Buffalo Board of Education."

C. Decisions Below

I—The District Court Decision of April 30, 1976

The District Court initially recognized that the question which had to be proven by plaintiffs on the trial was whether segregation in the Buffalo schools was brought about by "*purposeful* or *intentional* segregative acts"; citing *Keyes v. School District No. 1* (413 U.S. 189 [1973]) in which the Supreme Court of the United States held that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation *** is *purpose* or *intent* to segregate" (413 U.S., p. 208). The Court then stated its construction of the proof necessary to show intent:

> "In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or evenhandedness, or even 'badness' or 'goodness' on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in *Hart v. Community School Board*, 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd* 512 F. 2d 37 (2d Cir., 1975), to show that the probable and foreseeable result of the defendants' acts was segregation. In *Hart*, the district court found that the school board had unconstitutionally segregated a school despite the court's specific finding that the school board was not racially motivated. The board appealed this decision. The Second Circuit stated:

> 'Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation.' *Hart, supra,* 512 F.2d at 50."

The Court thus clearly relied upon the "natural and foreseeable consequence" test to determine intent.

The bulk of the Court's opinion deals with an evaluation of acts of the city defendants, rather than the State defendants.

The Court concluded as to the Buffalo Board of Education and the Common Council:

> "The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.
>
> "The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration."

However, dealing with its view of the State defendants' responsibility for segregation in the Buffalo schools, the Court relied primarily upon their power of supervision of the educational system of the State rather than upon specific acts, stating:

> "The actions of both the State Regents and the Commissioner of Education over the past two decades, and particularly since 1965, weave a saga of much talk and insufficient action, at least as far as the BPSS is concerned."

Concerning the directive of former Commissioner Allen to the Board of Education, mandating that the Board devise integration plans, and the continued efforts to secure cooperation from the Board, the Court stated:

> "This court does not quarrel with the initial decision to defer to local authorities to solve what is admittedly a complex and demanding situation. Chief Justice Burger has suggested that 'local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.' *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Both the Commissioner and the Regents acknowledge this concept (PX 304, at 2). But, when effective local action is not forthcoming, and no reasonable person could expect that it will be forthcoming, and repeated attempts at cajoling, pleading and coercing the local authorities into action have failed, there comes a time when those individuals with both the power and responsibility to act must assert themselves. Deference to local authorities is not an absolute and binding requirement. It is a policy decision with a defined and limited rationale, *i.e.*, that the local authorities have a greater degree of knowledge and insight into the complexities of local concerns. However, when the local authorities refuse to accept the responsibility that is theirs, State authorities have no recourse but to act. Neither the Commissioner nor the Regents did so in the case of the Buffalo public schools."

The Court then reviewed what had occurred in the years since the decision in *Yerby Dixon, supra.* In this respect, the Court detailed the Board of Education plan of January, 1968, and observed that the plan would have effectively integrated

the fifth through twelfth grades. Difficulties which occurred in 1968 in the implementation of that plan relative to portable classrooms and the middle school plan—the heart of the integration plan—was clearly attributed by the Court to the Common Council. As to the 1968 plan, formulated three years after *Yerby Dixon*, the Court concluded that "Had it been implemented, integration could have been achieved on a broad scale". Similarly, the Court attributed the Council's failure to negotiate for the purchase of Bishop Ryan High School to segregative motives of the Common Council, not of entities within the jurisdiction of the State defendants.

The Court's criticism of the State defendants rested mostly upon what the Court considered to be a failure to take strong decisive action. However, commenting upon defendant Nyquist's letter of January 1972, ordering the Board of Education to devise a new plan integrating all grades to reflect in each school the racial composition of the entire district, the District Court stated:

> "Following seven years of weak leadership and continued acquiescence in the Board's dilatory actions, this stern and comprehensive order provoked, perhaps predictably, a strong and divisive reaction among Board members."

That reaction prompted the Commissioner to send a State task force to Buffalo to develop a plan to be submitted to the Board, thus removing further initiative for integration planning from the Board of Education. That plan was, as the Court noted, rejected by the Board of Education in January, 1973.

While the Court was critical of the Commissioner's failure to remove members of the Board of Education or withhold State aid from Buffalo, the Court also recognized that no final order yet had been issued pursuant to which the Commissioner could take that action.

As to the State defendants, the Court found no affirmative acts of segregation, but rather concluded:

> "At the time this case was submitted for decision, ten and one-half years had elapsed since the 1965 *Yerby Dixon Appeal* and no significant improvement in desegregating the public schools in Buffalo had taken place. The Commissioner's actions over those ten years amount to a mountain of paper work with little substantive results. The lack of effective action by the Regents and by the Commissioner of Education has continued, and in some instances aggravated, racial segregation in the Buffalo public schools."

The District Court's finding of State liability was thus based not on segregative acts or intent but rather on lack of success in achieving integration of the schools in Buffalo.

The Court's conclusions are, when compared to the proof, themselves revealing (1165):

> "As the Supreme Court has often noted, 'it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.' *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). The same can be said for the motivation or motivations behind the actions of a school board or board of regents. When, however, the court is faced with a decade and more of intransigence and obstruction, of delay and procrastination, the interpretation of motivation becomes less difficult. The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Commissioner of Education and the Board of Regents intentionally created and maintained, in substantial part, the segregation in the BPSS."

and:

> "[T]he failure of the Board of Regents and the Commissioner of Education to take effective steps to end the segregation in Buffalo's public schools—all of these are evidence of a systematic program of segregation."

The State defendants were thus held liable for a lack of effective action—rather than an intent or purpose to segregate.

II—The District Court Decision of March 1, 1977

Subsequent to the December 7, 1976 decision of this Court in *Austin Independent School District v. United States*, 50 L. Ed. 2d 603, the District Court in the instant action requested the parties to brief *Austin* and *Washington v. Davis*, 426 U.S. 229 (1976) as they might apply to the instant decision, as well as this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 50 L. Ed. 2d 450, which was also considered by the parties.

The District Court then proceeded to hold that the "natural and foreseeable consequences" test may be utilized to demonstrate the discriminatory intent required by the decision in the above-cited cases. The Court then reconsidered its April 30, 1976 decision and concluded that it had there found intentional discriminatory acts on the part of defendants.

III—The Court of Appeals Decision of March 8, 1978

The decision by the Court below recognized first that it is only intentional or *de jure* segregation which is constitutionally prohibited by the decisions of this Court (App. J., p. 174a) and that to succeed a plaintiff "must be able to show that school officials purposefully or intentionally acted to segregate students" (*ibid.*). The Court then considered the problems inherent in proving segregative intent and set forth the standard by which it analyzed and judged the record in the instant case (App. J., pp. 175a-176a):

> "In our opinion in *Hart v. Community School Board of Education*, 512 F. 2d 37 (2d Cir. 1975), this court sought to strike a balance between competing views of 'segregative intent' by extracting from those views that which we found conceptually defensible, and at the same time that which was consistent with the Supreme Court's constitutional mandate. In *Hart*, we held that a finding of *de jure* segregation could be based on acts of omission or commission undertaken by governmental authorities, which have the 'natural and foreseeable consequence of causing educational segregation.'

"We took note of the Supreme Court's recognition of the difficulty of applying a subjective standard of proof in this area. See *Hart v. Community School District Board of Education, supra,* 512 F.2d at 50 citing *Palmer v. Thompson,* 403 U.S. 217 (1971) and *Keyes v. School District No. 1, Denver, Colorado, supra,* 413 U.S. at 233-34. See also, *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S. at 264-68; *Washington v. Davis, supra,* 426 U.S. at 253-54 (Stevens, J., concurring); *Wright v. Council of the City of Emporia,* 407 U.S. 451 at 461-62 (1972). And we cited with approval the opinion of the Court of Appeals for the Sixth Circuit in *Oliver v. Michigan State Board of Education,* 508 F.2d 178 at 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975):

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.
> [Citations omitted.]

See also, *NAACP v. Lansing Board of Education,* 559 F.2d 1042 (6th Cir.), *cert. denied,* 46 U.S.L.W. 3390 (Dec. 13, 1977), which reaffirms the Sixth Circuit's holding in *Oliver.*"

In view of the petitioner's construction of the Court's interpretation and application of its decision in *Hart* (Pet. pp. 26, 35-39), it is significant to note the Court below's own analysis of that case and its application (App. J., pp. 176a-177a):

> "In *Hart,* we rejected a purely subjective standard of proof because we were unable to make good sense of the notion of a 'collective will' which 'intends' a certain outcome, and because of the 'injustice of ascribing collective will to articulate remarks of particular bigots,' *Hart, supra,* 512 F.2d at 50. We also noted the very difficult

problems of proof inherent in the adoption of a subjective definition of 'intent.'

"At the same time, we avoided espousing a purely objective test of intention, for such a view would be excessively broad, bringing virtually all racial imbalance within the rubric of *de jure* segregation.* Furthermore, mere foreseeability cannot be identified with intention, for there are surely many cases in which events are both known to be likely, but nevertheless not intended.*

"In *Hart,* we steered a course between objective and subjective theories of segregative intent by holding that foreseeable consequences, while not specifically identifiable with intention, can provide evidence for its presence. See *Hart, supra,* 512 F.2d 50, 51. Hence our approval of the Sixth Circuit's opinion in *Oliver,* which indicated that foreseeable results created a presumption of segregative intent which could be rebutted by a showing that state actions were consistent with racially neutral policies. Furthermore, we stressed that segregative intent could only be inferred in the context of an examination of alternative policies available to state officials. *Hart, supra,* 512 F.2d at 51.

"In adopting this approach, we focused not on the mental processes of a changing group of school board members, but rather on the actions taken by the board itself. When such actions have the 'natural, probable, and foreseeable result of increasing or perpetuating segregation,' a presumption of segregative purpose is created. The burden of proof then shifts to defendant officials to show that the pattern of actions taken by those officials can be explained in a manner consistent with the absence of segregative intent. Put differently, once the burden of proof has shifted, school officials must be able to demonstrate that no reasonable alternative policy would have achieved the same permissible educational goals with less segregative effect. When such a showing cannot be made, it is entirely reasonable to infer that the officials acted with unlawful segregative intent."

* Footnotes omitted.

Petitioners here, as in the Court below, rely upon this Court's remand of *United States v. Texas Education Agency*, 532 F. 2d 380 (5th Cir., 1976), remanded *sub nom. Austin Independent School District v. United States*, 429 U.S. 990 (1976), as a repudiation of the "foreseeable consequences" test employed in *Hart*. In that respect, the Court below stated (App. J., pp. 177a-178a):

> "The reasoning which underlies the remand of *United States v. Texas Education Agency* is not clear from the Court's one-line *per curiam* opinion. Justice Powell's concurring opinion appears to locate the lower court's error in its readiness to infer segregative intent exclusively from the use of neighborhood schools, 429 U.S. at 991-92. But this does not apparently challenge the standard used to infer segregative intent, as much as its particular application in that case. Furthermore, Justice Powell appears to approve of the inference of segregative intent from other findings made by the district court. See 429 U.S. at 991-92, n. 1.
>
> "In *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S. 252, the Court lists a number of factors, not intended to be exhaustive, which can provide evidentiary support for a finding of segregative intent. These factors do not, however, appear to be in any way inconsistent with the analysis developed in *Hart*. See also *Washington v. Davis, supra,* 426 U.S. at 253 (Stevens, J., concurring).
>
> "In sum, then, we believe that the *Hart* test remains valid even after the Supreme Court's opinions in *Washington v. Davis, Arlington Heights v. Metropolitan Housing Development Corp.*, and *Austin Independent School District v. United States*. We find that it is a cogent application of the Supreme Court's requirement of proof of segregative intent, that it avoids conceptual pitfalls inherent in alternative approaches, and that it provides a method of proof which is fair to both plaintiffs and defendants in cases of alleged unlawful racial segregation."

Applying those tests to the actions of the State defendants, the Court concluded (App. J., pp. 184a-185a):

> "We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.
>
> "We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a constitutional violation. As we indicated in *Hart v. Community School Board, supra,* 512 F.2d at 48:
>
> > We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation.
>
> To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case.
>
> "Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith.
>
> "Similarly, we do not believe that the appellees' theory of derivative or indirect liability can be sustained. Such a theory is precluded by the Supreme Court's opinion in *Rizzo v. Goode, supra,* 423 U.S. 362, which requires a

more direct link between the illicit school segregation and an intentional policy adopted by the state appellants which indicates specific approval of the actions of the city appellants. No such approval is indicated in this case.

"Under the standard announced in *Hart*, then, we are unable to conclude that the state appellants acted or omitted to act with the required segregative intent, and hence we must reverse the trial court's finding of liability as to these appellants."

ARGUMENT

Certiorari should not be granted in this case since the Court below, applying a liberal standard of liability, found that insufficient proof of segregative intent had been shown as to the State defendants.

The question presented by the petition is whether the decision of the Court below is consistent with the recent decisions of this Court, *e.g. Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan H. D. Corp.*, 429 U.S. 252 (1977); *School District of Omaha v. United States*, 433 U.S. 667 (1977).

In *Austin Independent School District v. United States*, 429 U.S. 990 (1976), this Court vacated a judgment of the Court of Appeals for the Fifth Circuit, which had found a constitutional violation in the administration of the schools in Austin, Texas, and remanded the case to that Circuit for consideration in the light of *Washington v. Davis*, 426 U.S. 229 (1976).

In *Washington*, this Court stated that the Equal Protection Clause of the Constitution prohibits "official conduct discriminating on the basis of race", but added (426 U.S., p. 238):

"*** our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."

This Court then cited *Strauder v. West Virginia*, 100 U.S. 303 (1880), wherein the Court held:

"A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the prescribed race or by an unequal application of the law to such an extent as to show intentional discrimination."

The rule that an "intent to discriminate" must be shown was also stated in *Wright v. Rockefeller*, 376 U.S. 52 (1964), involving congressional apportionment. As to school segregation cases, this Court stated in *Washington* (426 U.S. p. 240):

"The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action *** the differentiating factor between de jure segregation and so-called de facto segregation *** is *purpose* or *intent* to segregate.' Keyes v. School District No. 1, 413 U.S. 189, 205, 208 (1973)."

Having cited the above cases, this Court specifically rejected the concept that "the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative

classifications." The evidence necessary to sustain a finding of unconstitutional discrimination was discussed at length in this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra.* This Court there discussed not only the test of unconstitutional discrimination which is to be applied, but also the type of evidence needed to prove such discrimination. Referring to *Washington v. Davis, supra,* this Court said that that case had "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. *** Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." As to the evidentiary standard to be applied, the Court's opinion states (429 U.S., pp. 265-268):

> "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.
>
> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis,* 426 U.S., at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race,

> emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins,* 118 U. S. 356 (1886); *Guinn v. United States,* 238 U.S. 347 (1915); *Lane v. Wilson,* 307 U.S. 268 (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.
>
> "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See *Lane v. Wilson, supra; Griffin v. County School Board,* 377 U.S. 218 (1964); *Davis v. Schnell,* 81 F. Supp. 872 (SD Ala.), aff'd *per curiam,* 336 U.S. 933 (1940); cf. *Keyes v. School District No. 1,* 413 U.S., at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman v. Mulkey,* 387 U.S. 369, 373-376 (1967); *Grosjean v. American Press,* 297 U.S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See *Tenney v. Brandhove,* 341 U.S. 367 (1951); *United States v. Nixon,* 418 U.S. 683, 705 (1974); 8 Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).

> "The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." (Footnotes omitted.)

The Court below in the instant case clearly recognized that the plaintiffs' burden was to show that "school officials purposefully or intentionally acted to segregate students" (App. J., p. 174a). Referring to its decision in *Hart v. Community School Board of Education*, 512 F 2d 37 (2d Cir., 1975), the Court below stated (App. J., p. 175a):

> "In *Hart*, we held that a finding of *de jure* segregation could be based on acts of omission or commission undertaken by governmental authorities, which have the 'natural and foreseeable consequence of causing educational segregation.' "

However, in *Hart*, as the Court pointed out below, the opinion also cited with approval the opinion of the Court of Appeals for the Sixth Circuit in *Oliver v. Michigan State Board of Education*, 508 F 2d 178 (1974), *cert. den.* 421 U.S. 963. in which that Court stated (508 F 2d, p. 182):

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies."
> (Citations omitted.)

This approach to proving segregative intent is consistent with that adopted by the Court of Appeals for the Eighth Circuit in *United States v. School District of Omaha*, 521 F. 2d 530, and in which this Court denied certiorari (423 U.S. 946), as noted by this Court in its remand of the same case in a later appeal for consideration of the remedy (433 U.S. 667 [1977]).

The approach adopted by the Court below, that is, a presumption arising out of foreseeable consequences creates a liberal standard for establishing liability. However, even applying that liberal standard, the Court found that segregative intent had not been proven on the part of the State defendants, although it did find acts of the City defendants which fulfilled its concept of the evidentiary standard for proof of segregative intent.

In this respect, it is essential to note that the Board of Regents acts primarily as a legislative policy-making body, establishing educational policy for all institutions of learning in New York, both public and private, at the elementary, secondary, and college or university levels. The Board has no direct function in the administration or supervision of public school systems in the State.

The Commissioner of Education of the State of New York is appointed by the Regents and operates as head of the State Education Department. That Department has specific statutory powers of supervision of the various school districts of the State in the implementation of educational policy as prescribed by the Legislature and the Regents. Neither the Department nor the Commissioner administers the schools or is entrusted with responsibility for their day-to-day operation.

The operation of the schools is the function of local school districts under extensive "home rule" powers granted to them by the State Constitution and statutes.

The Commissioner also has judicial powers whereby he can hear appeals from decisions of local boards of education. It is pursuant to this power that Commissioner Allen heard and decided the *Yerby Dixon* appeal in 1965.

Additionally, in certain large city school districts, such as Buffalo, appropriations for school district expenses are con-

trolled by the Common Council of the City. At the time this action was commenced, the members of the Buffalo Board of Education were appointed by the Mayor.

The opinion of the Court below makes it clear that the evidence as to the State defendants did not support findings of intentional segregation by those defendants (App. J., pp. 182a-185a):

> "The record is significantly different with respect to the state appellants. As early as 1960, the New York State Board of Regents issued a policy statement urging desegregation of New York's public schools. This expression of intent has been reaffirmed on many subsequent occasions.
>
> • • •
>
> The Commissioner found that *de facto* segregation existed in Buffalo, and ordered the Board of Education to submit an integration plan within three months.[23] The Commissioner subsequently found this plan inadequate, and appointed an Advisory Committee to develop a satisfactory program.
>
> "The Buffalo Board of Education approved the proffered program 'in principle,' but then submitted a plan which the Commissioner found 'disappointing and unsatisfactory.' Finally, on January 30, 1968, the Board submitted a plan which the Commissioner found acceptable. The Board was then ordered to submit periodic reports on the implementation of the program.
>
> "This plan, had it been implemented, would likely have reduced racial segregation in the Buffalo schools, but the City's Common Council refused to appropriate funds to implement the Board's plan. In January, 1972, the Commissioner instructed the Board to submit a new desegregation plan; the Board refused to submit such a plan. The Commissioner then sent members of his staff to Buffalo in order to work with the Board in designing a desegregation plan. The Commissioner's staff submitted its recommendations to the Board in November, 1972, but the Board rejected the proposals.

> "Finally, in January, 1975, following recovery from a heart attack, the Commissioner issued a show cause order to the Buffalo Board of Education in which he threatened to exercise his statutory enforcement powers.
>
> • •
>
> "We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.
>
> "We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a constitutional violation. As we indicated in *Hart v. Community School Board, supra,* 512 F.2d at 48:
>
> > We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de factor* rather than *de jure* segregation.
>
> To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case."

However, as to the City defendants, the Court did find specific acts which it considered proof of segregative intent, for example (App. J., pp. 180a-182a):

> "The district court acted well within its discretion in finding, for example, that the Buffalo school board redistricted East High School in a series of actions which

began at least as early as 1954. The cumulative effect of these actions was the exclusion from the district of areas of white population density and the inclusion of areas of black population density, making East High School virtually an all-black school. Furthermore, the school board permitted students to transfer from their local high schools when those schools did not teach a particular foreign language when the student wished to study. Substantial evidence indicates that this policy was used to manipulate the racial composition of East High School by systematically permitting white students to transfer to high schools with white majorities. In at least some instances, different standards for obtaining 'language transfers' were applied to black and white students.

• • •

"We believe that Judge Curtin did not err in finding that these changes in attendance zones and the granting of language transfers had the natural and foreseeable effect of increasing racial segregation in the Buffalo schools. At the same time, alternative policies were available to the Board which would have achieved its educational goals while avoiding increased segregation. It follows that the Board's policies give rise to a valid presumption of intentional segregation by Buffalo school authorities.

"The district court further found that while the siting of Woodlawn School in the North Masten District was based on racially neutral economic and demographic considerations, the formulation of the school's attendance zone was not. While several possible arrangements which permitted integrated education were proposed, that plan which resulted in the school's having a student population over 99% black was selected. Evidence suggests that this decision was strongly influenced by residents who opposed integrated schooling.

"The school board permitted the operation of 'optional areas,' allowing white students to avoid attending

predominantly black schools. This policy clearly had the foreseeable effect of contributing to racial segregation in the Buffalo schools.

"Furthermore, discriminatory admission policies in the city's vocational schools, and racially biased recruiting and assignment of staff members, suggest intentional segregation by the school board."

Those different findings are internally consistent applications of the standard of proof applied by the Court below and do not provide a basis for the grant of certiorari.

CONCLUSION

The petition for certiorari should be denied.

Dated: July 17, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
AUG 3 1978
MICHAEL RODAK, JR., CLERK

October Term, 1978

No. 78-30

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Petitioners,

against

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Respondents,

and

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1978

No. .....

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, *et al.*,

Petitioners,

v.

GEORGE ARTHUR, *et al.*,
EWALD NYQUIST, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Respondents in Opposition

The respondents (plaintiffs below) oppose the petition for certiorari of Joseph Manch, individually and as Superintendent of Schools of the City of Buffalo, Eugene T. Reville, individually and as Superintendent of Schools of the City of Buffalo, The Board of Education of the City of Buffalo and its individual members, the Mayor of the City of Buffalo, the Common Council of the City of Buffalo and its individual members (the "City petitioners").

Questions Presented

1. Did Both Lower Courts Correctly Apply Legal Standards as Enunciated by This Court in Determining that the City Petitioners Acted or Failed to Act with Segregative Intent?

2. May Courts, Sitting in School Desegregation Cases, Consider, as Relevant and Probative, Evidence and Proof of Private and Public Residential Segregation?

3. Is the Circuit Court's Reversal as to Liability of the State Defendants, Consistent with the Affirmance of Liability, by the Circuit Court, of the City Petitioners?

Statement of the Case

A. Procedural History

This brief will rely on the appendix to the petition for certiorari submitted by the City Petitioners in No. 78-. . . ., which will be cited as "App".

The procedural history of this case, including the decision of the District Court, is summarized in the petition and will not be repeated here. Petitioners' statement with respect to the decision of the Court of Appeals, however, is argumentative rather than factual and requires clarification.

The Circuit Court's decision does not impose an affirmative duty to achieve racial balance in the Buffalo schools as contended at page 12 of Petitioners' Brief. The decision affirms the District Court's finding that "the City Appellants (petitioners herein) are liable for unlawful segregative acts." (App. 166a).

On appeal, the Circuit Court considered both the District Court's original liability opinion (App. 1a-117a) and its supplemental opinion issued upon consideration of recently decided Supreme Court cases (App. 143a-162a).

The Court of Appeals closely examined the actions and inactions of the City petitioners, which the District Court had found to be *de jure* segregative conduct (App. 179a-182a). The Court of Appeals concluded that:

> We are unable to imagine a set of facts, short of public admission of wrongdoing, which would be more suggestive of intentional discrimination. We are confronted here with a pattern of action and inaction the natural and foreseeable consequence of which is the increased segregation of the Buffalo Public Schools. This being sufficient to make out a *prima facie* case of intentional segregation, it must be inquired whether the appellants have been able to rebut this conclusion. We find nothing in the record, however, which suggests a neutral, non-discriminatory rationale for the pattern of actions taken by the City appellants. No policy, save segregation itself, can consistently explain the pattern of transfers, zoning, optional attendance areas, staff recommitment and assignment and general obstructionism which marks the actions of the City appellants. We consequently approve the findings of the District Court that these appellants acted in intentional violation of 42 U.S.C. § 1983 (App. 182a).

B. Factual History

At the time of the liability trial, the pupil population of the Buffalo Public Schools was 60,060, of whom 53.3% were white, and 46.7% were non-white (App. 25a). The system consisted of 77 elementary schools, 4 middle and 2 junior high schools, 7 academic and 6 vocational-technical high schools (App. 25a).

With few exceptions, there were separate schools for whites and separate schools for blacks. At the time of trial, 55 of 77 elementary, 5 of 6 middle and junior high schools, and 7 of 13 high schools were from 80-100% majority or minority (App. 25a).

Perhaps the most powerful summary of the City defendants segregative acts which compelled the District Court to find widespread segregation, and constrained the Second Circuit to remark that "We are unable to imagine a set of facts, short of public admission of wrong doing, which would be more suggestive of intentional discrimination" (App. 182a), are the findings of the respondent Ewald P. Nyquist, then Commissioner of Education of the State of New York, who in January 1975, after nine defiant years of dealing with Buffalo Board of Education, stated the following in an order to show cause:

> A review of other events over the past nine years makes it clear that the respondent has not only neglected to develop and implement an effective plan for racial integration of its schools, but by certain of its acts, procedures and policies has increased segregation within its schools.
>
> The respondent has changed the grade levels served by certain schools, and in so doing has transferred minority students from predominantly white schools to predominantly minority schools.
>
> The respondent has operated a school attended by predominantly black children in an area which is surrounded by predominantly white schools. In so doing the board has established and maintained school attendance areas which have resulted in segregation.
>
> The respondent has maintained certain grade structures for predominately white schools and other grade structures for predominately minority schools. According to 1974-75 data, of the twenty-eight schools serving grades K-8, twenty are predominately white. The district's K-4 schools are all predominately white, and its K-7 schools are predominately white. While its K-5 and K-6 schools range from 6.7% minority enrollment to all minority students, most are substantially segregated. Only two of the thirty-four K-5 and K-6 schools have minority enrollments which are within 10% of the district average.

> Differences in grade structure account for most white students entering high school at the ninth grade level, and most minority students entering at the tenth grade level, thus creating racially isolated schools for the ninth year.
>
> The respondent has maintained 'optional transfer zones' which have resulted in an intensification of segregation. Data indicate that white students living within such zones have been transferred from schools with increasing minority enrollments to predominately white schools, with no comparable transfers from those areas on the part of black students.
>
> The respondent has established attendance zones for newly constructed schools which have resulted in those schools being substantially segregated, although attendance zones could have been established in such a way that the student bodies would have been integrated.
>
> The respondent has made decisions and established policies which have resulted in substantially segregated programs in special education for mentally retarded pupils. The board has arranged to transport many special education children to essentially segregated schools.
>
> The board has operated an essentially all-black vocational school for girls.
>
> The board has operated a school for pregnant girls which has an all-black student body.
>
> The respondent has permitted white students to transfer out of a high school with an increasing minority population to other predominantly white high schools under a transfer policy based on course selection and offerings. In past years the board approved the offering of certain foreign languages in predominantly white high schools but did not offer comparable courses in a predominantly black high school, thus encouraging increased racial isolation. This transfer policy was substantially responsible for a high school becoming, in 1974-75, 99% black in student population.

The respondent has not employed minority professional staff members in numbers which are comparable to the school enrollments of the general population of the city. During the past eight years the percentage of minority staff members has actually declined. A pattern has been developed of assigning minority teachers to schools with high minority populations, thus intensifying the racial isolation of students in the school system.

The respondent, in official board action in 1965, instructed its superintendent to develop an integration plan, but specified that it must not involve the transportation of white children into non-white areas. Such action illustrates the dual standards which have prevailed in board policies concerning the education of white and minority-group children, and which have resulted in a segregated school system.

It is clearly evident from these facts that the respondent is maintaining a segregated school system, a condition which is contrary to law and to state policy.

It is also evident that the Buffalo board of education has taken actions which have had both the purpose and the effect of maintaining a substantially segregated school system, and that there is a direct relationship between the acts of the board of education and the current condition of segregation. In taking such actions, and in continuing to operate a segregated school system, the Buffalo board of education has violated the Fourteenth Amendment to the Constitution of the United States and has denied equality of educational opportunity to many of its children by reason of their race [Exh. 306; A-1743; A-1747] (Appendix in 2nd Circuit).

The brief of the petitioners deftly passes over these events as if they just happened.

Among the many significant findings of segregative intent, the Court below found that beginning in 1954, the school authorities througn a series of boundary changes and optional

zones, redistricted East High School (App. 32a-36a, 180a). The cumulative effect of these actions was found to exclude from the East High School district areas of white population density and include within the district areas of black population density (App. 32a-36a).

The lower Courts also found that between 1960 and 1972, the City petitioners permitted significant numbers of white students to transfer from East High School to other academic high schools in the district to take special language courses not offered at East (App. 36a-43a). Despite warnings as early as 1963, from certain administrative staff that this policy would result in increasing segregation at East High School, the policy continued until 1972, when the school had become 98.3% black (App. 39a-41a).

The manner in which the school authorities drew attendance boundaries for the newly constructed Woodlawn School was found by the lower Courts to have intentionally resulted in that school opening with a 99% black student population (App. 49a-54a, 181a). It was found that the school authorities decision with respect to Woodlawn's attendance area was "strongly influenced by residents who opposed integrated schooling." (App. 181a).

It was also found that the manner in which the school authorities administered policies on student transfers and optional zones, allowed white students to transfer from predominantly black schools to predominantly white schools (App. 54a-64a, 181a).

The admissions policies of the City's vocational high schools were found to be racially discriminatory (App. 64a-68a, 181a).

The policies of the school authorities with respect to staff were found to be racially discriminatory and segregatory (App. 68a-77a, 181a).

As regards the local school authorities, the Courts found that the Board engaged in "dilatory, evasive and at times obstructionest" conduct in response to the State Commissioner and Regents' order to integrate (App. 77a-98a, 182a). The Courts found that the Common Council aided the Board in their resistance by "systematically" denying funding to programs which would have encouraged racial integration (App. 86a-90a, 182a).

Additionally, the Courts found that the City of Buffalo defendants (also petitioners herein) assigned residents to the City-operated public housing projects in a segregative manner (App. 102a-108a). The Courts further found that relocated families, displaced as a result of urban renewal, in a manner which exacerbated segregated housing conditions (App. 109a).

The lower Courts found that various schools within the Buffalo Public School system were segregated, that this segregation was intentionally caused by the petitioners, and that a substantial and meaningful portion of the school district had been intentionally segregated (App. 99a). The Courts further found that the petitioners failed to meet their burden of showing that the instances of segregation were not caused by their design or device. *Keyes v. School District, No. 1, Denver*, 413 U.S. 189, 210 (1973) (App. 100a, 182a).

ARGUMENT

I. The Lower Courts Correctly Applied the Standards Enunciated by This Court in Determining that the City Petitioners Acted or Failed to Act with Segregative Intent.

The City petitioners' contention that certiorari should be granted to review the legal standards which were applied by the lower Courts totally ignores the explicit statements of the

Courts below in their legal analyses (App. 19a-22a, 146a-158a, 173a-182a), and is without merit.

1. Contrary to the simplistic approach in Petitioners' brief, in determining the Constitutional liability of the City petitioners for the segregation existing within the Buffalo Public Schools, the lower Courts did not rely on or apply the mere "discriminatory effects" test which has been rejected by this Court. *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

In their analyses of the applicable standards, the District Court and Court of Appeals began with this Court's decision in *Keyes v. School District, No. 1, Denver*, 413 U.S. 189 (1973), which has been cited with approval by this Court in *Washington v. Davis* and *Arlington Heights*, for the proposition that proof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause (emphasis added).

In *Keyes*, this Court held that where it had been shown that school authorities by various actions and inactions, including school site location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, concentrated minority students in certain schools and white students in other schools, the burden was on the school authorities to show that such actions were not taken to create or maintain segregation (413 U.S. at 213-214).

Similarly, in determining whether the City petitioners had acted or failed to act with segregative purpose or intent, the lower Courts held that:

> . . . a finding of *de jure* segregation could be based on acts of omission or commission under taken by govern-

mental authorities which have the natural and foreseeable consequence of causing educational segregation (App. 175a).

Once such a finding was made, the Courts below concluded that a presumption of segregative purpose was created (App. 177a). The burden was then upon the defendant school officials to show that the pattern of actions could be explained in a manner consistent with the absence of segregative intent (App. 177a).* Failing to come forward with such an explanation, the lower Courts concluded that "it is entirely reasonable to infer that the officials acted with unlawful segregative intent." (App. 177a).

Rather than dispense with the requirements that segregative intent or purpose be proven, the Courts below held that the required segregative intent could be inferred from acts or policies of school authorities which had the natural and foreseeable effect of creating segregated schools. This test is entirely consistent with decisions of this Court. An "invidiously discriminatory purpose may be inferred from the totality of relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

2. The findings of the District Court and the Court of Appeals that the City petitioners were guilty of *de jure* conduct clearly did not rest solely upon the resultant disproportionate

* This principle has been upheld by this and other Courts. *Keyes, supra*, 413 U.S. at 209-210, and cases cited therein, *Arlington Heights, supra*, 429 U.S. at 270, fn. 21. *Oliver v. Kalamazoo Board of Education*, 508 F.2d 178 (6th Cir., 1974), *cert. denied*, 421 U.S. 963 (1975); *NAACP v. Lancing Board of Education*, 559 F.2d 1042 (6th Cir., 1977), *cert. denied*, 98 S.Ct. 635 (1977).

impact of the petitioners actions and policies.* While not conclusive proof of invidious racial discrimination, disproportionate impact is relevant and provided an important starting point for the lower Courts in their analyses. *Washington v. Davis, supra*, 426 U.S., at 242.

In addition to the substantial racial imbalance in the Buffalo Public Schools, the lower Courts also found that the City petitioners had engaged in conduct which has been found by this and other Courts to evidence *de jure* segregation. Specifically, the District Court found, and the Court of Appeals affirmed, that the City petitioners had manipulated school attendance zones in a segregative manner (App. 332a-342a, 180a), had permitted racially segregative student transfers (App. 362a-432a, 180a-181a), had drawn school attendance boundaries for the newly constructed Woodlawn Junior High School in a racially segregative manner (App. 442a-542a, 181a), had created optional zones and permitted transfers which allowed white students to avoid attending schools with predominantly black student enrollments (App. 54a-64a, 181a); had promulgated racially discriminating admission policies with respect to the City's vocational schools (App. 64a-69a, 181a); had practiced racial discrimination and segregation in the recruitment and assignment of staff mem-

* In characterizing the issue for resolution, as identified by the District Court in its reconsideration opinion, as "whether it had found a constitutional violation on the basis of disproportionate impact alone, without a finding of racial discriminatory intent." (Petitioners' Brief, at 28), the City Petitioners misstate the District Court. The question on reconsideration as defined by the District Court was:

> . . . did this Court find that the defendants intentionally acted and refused to act so as to segregate and maintain the segregated condition of the Buffalo Public School Systems, or did it find a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent (App. 155a).

In affirming liability against the City petitioners, the District Court concluded that its findings were based upon the former.

bers (App. 68a-77a, 181a) and had engaged in "delatory, evasive and at times obstructionist" actions in response to the State Commissioner and Regents' order to integrate (App. 77a-98a, 182a).

The Courts below also found that other City of Buffalo officials including its Common Council, operated in lock-step with the school authorities to exacerbate and perpetuate segregation within the public schools, by systematically denying funding to programs which would have encouraged racial integration (App. 86a-90a, 182a), by racially segregating residents within public housing projects operated by the City (App. 102a-108a), and by segregatively relocating displaced families whose homes were razed pursuant to the City's urban renewal programs (App. 109a-110a).

In rebuttal to such overwhelming *prima facie* evidence of *de jure* segregation, the City petitioners alleged only that they had followed a "racially neutral neighborhood school policy." The Courts below held that the City petitioners had not met their burden of showing that the instances of segregation were not caused by their design or device. *Keyes, supra*, 412 U.S. at 210. In finding that the neighborhood school policy was not racially neutral, the District Court observed that this policy was:

> . . . followed when its results were seen as acceptable; it was disregarded and subverted when the Board saw fit (App. 100a).

As this Court has noted:

> . . . the mere assertion of such a policy is not dispositive where . . . the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation. *Keyes, supra*, 413 U.S. at 212.

3. The City petitioners' contention that *Arlington Heights, supra*, requires a finding of subjective racial motivation or illicit purpose is not supported by this Court's decision in that case. Racial animosity, ill will or intent to do harm are not necessary criteria to support a finding of segregative intent or purpose.

It is the intent to segregate regardless of personal motivation which is relevant and probative.

In *Washington v. Davis, supra*, Justice Stevens, in a concurring opinion, wrote:

> Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making and of mixed motivation. It is unrealistic on the one hand, to require the victim of alleged discrimination to uncover actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate actions simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it (426 U.S. at 253).

Similarly, this Court in *Arlington Heights, supra*, held that it was not necessary that a plaintiff prove that a challenged action rested solely on racially discriminatory purposes. 429 U.S., at 265, citing *Washington v. Davis*. This is so because:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. 429 U.S. at 265.

In *Arlington Heights*, this Court identified, "without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." The City petitioners' conclusion, however, that *Arlington Heights* requires "personal admissions of the target public officials as a basis for the required inference of an illicit motive." (Petitioners' Brief, at 28) is simply a misstatement and misinterpretation of this Court's instructions in *Arlington Heights*.

4. The City petitioners' assertion that the District Court improperly relied on evidence of segregatory housing policies of various public and private entities is without merit.

From the start of this action, the City petitioners consistently raised, as a defense to school segregation, residential segregation which existed within the City of Buffalo. When, however, proof was offered which unequivocally demonstrated that action under color of state law helped to produce, in the first place, the residential segregation, the City petitioners abandoned their position and claimed that such evidence was irrelevant.

Pages 101a to 114a of the App. contain the Trial Court's discussion and findings upon the housing evidence in its liability decision of April 30, 1976. Pertinent parts are set out in the following:

> IV-H. *HOUSING*
>
> THE EVIDENCE
>
> None of the parties to this lawsuit dispute the existence of severe residential segregation in the City of Buffalo, nor do the parties dispute the fact that the housing problems have contributed to the racial isolation and imbalance present in the Buffalo public schools. The City defendants claim that the housing segregation is the direct cause for the school segregation, that they are blameless for the existence of residential segregation and are not constitutionally required to correct it (Answer

> for City Defendants at ¶¶ 17, 19; Post-trial Brief for City Defendants, at 1). Consequently, they argue that any evidence regarding the housing situation is irrelevant to the issue: intentional segregation in the BPSS (Record, Vol. IV, at 143, 161-162, 173; Vol. V, at 110-111; Vol. VI at 10). The State defendants agree that the housing evidence should have been stricken at trial as irrelevant. In addition, they argue that they have no legal responsibility for housing matters in New York State (Post-trial Brief for State Defendants, at ¶¶ 36, 37).
>
> The plaintiffs introduced evidence tending to show that both the containment of minorities in certain areas of the City, and the exclusion of minorities from suburban areas, did not occur by chance. This evidence can most easily be discussed by dealing with the allegedly discriminatory parties seriatim: (1) The Federal Government; (2) The Buffalo Municipal Housing Authority [BMHA], (3) The Real Estate Industry, and (4) The City of Buffalo (App. 101a).

The Court considered the relevancy of the housing evidence at pages 110a *et seq.*, of the App. noting that such evidence has not been ruled inadmissable by the Supreme Court (cf. *Milliken v. Bradley*, 418 U.S. 717 at 728 n. 7 (1974)) and stated "Because of the defendants' primary reliance on the residential composition of Buffalo as a defense to this action, we feel it necessary and appropriate to express our findings on the housing evidence." (App. 11a) and at pages 112a and 113a:

> The City defendants cannot use the residential segregation as a defense because, as the evidence demonstrates, they helped to cause the residential segregation through the Ellicott Relocation Program. The Common Council's portable classroom ordinance, discussed in section IV-F of this opinion, *supra*, and the Board's districting of Woodlawn Junior High School, discussed in section IV-B of this opinion, *supra*, are examples of how the City defendants attempted to sustain and prolong the racial separation in schools that residential

> segregation encourages. But, even had the City defendants not actually contributed to residential segregation, to allow them to hind behind a condition they have long been aware of, that they have the authority to alleviate and that they once, in the City's Model Cities application, committed themselves to rectify, would be untenable.

The District Court made specific findings that many of the practices of the City of Buffalo authorities, who are petitioners herein, contributed to or intensified racial residential segregation in the City. These actions coupled with the school authorities operation of a "neighborhood school policy" in a manner which maximized racial segregation within the schools clearly was probative and relevant evidence of segregative intent.

This Court has long recognized the reciprocal effect the racial composition of schools and residential neighborhoods have on one another. *Keyes, supra,* 413 U.S. at 202. In *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) this Court stated:

> . . . People gravitate toward school facilities, just as schools are located in response to the needs of people. The locations of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. 402 U.S. at 20.

II. The Courts Below Did Not Apply Inconsistent Standards as Between City-State Defendants.

Starting at page 35 of Petitioners' brief, it is "argued" that "The Circuit Court Applied Inconsistent Standards of Intent to the City and State Defendants."

The basis of this contention is unclear as the "reasoning" in pages 35-39 discusses subjective-objective aspects in contradictory fashion.

The Second Circuit's reversal as to the State defendants was based upon the conclusion that "We are unable to conclude that the state appellants acted or omitted to act with the required segregative intent" (App. 185a), in spite of the Court's not disagreeing with the trial Court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter (App. 184a). The Second Circuit also noted "Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith." (App. 185a).

The findings below as to all city Petitioners are succinctly summarized by the Trial Court:

> "The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.
>
> "The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration." (App. 77a, 77b).

There was powerful evidence of segregative intent as to all City Petitioners. The issuing of causal relationship was one of fact for the lower Courts. The statement at page 36 of Petitioners' brief that "While it may reasonably be maintained that there was substantial evidence of overt bigotry in oc-

casional actions by the Common Council, as was revealed in the portable classroom controversy, no causative relationship was shown between that unworthy conduct and the segregated character of the school system", is tantamount to an admission of segregative intent by the Petitioner Common Council. It also highlights the Second Circuit conclusion:

> We are unable to imagine a set of facts, short of public admission of wrongdoing, which would be more suggestive of intentional discriminations (App. 182a).

CONCLUSION

The petition for certiorari should be denied.

Dated: Buffalo, New York
August 1, 1978

Respectfully submitted,

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